

Indiana Law Review



Volume 17 No. 3 1984

Symposium on Indiana's Comparative Fault Act

The Indiana Comparative Fault Act At First (Lingering) Glance

Lawrence P. Wilkins

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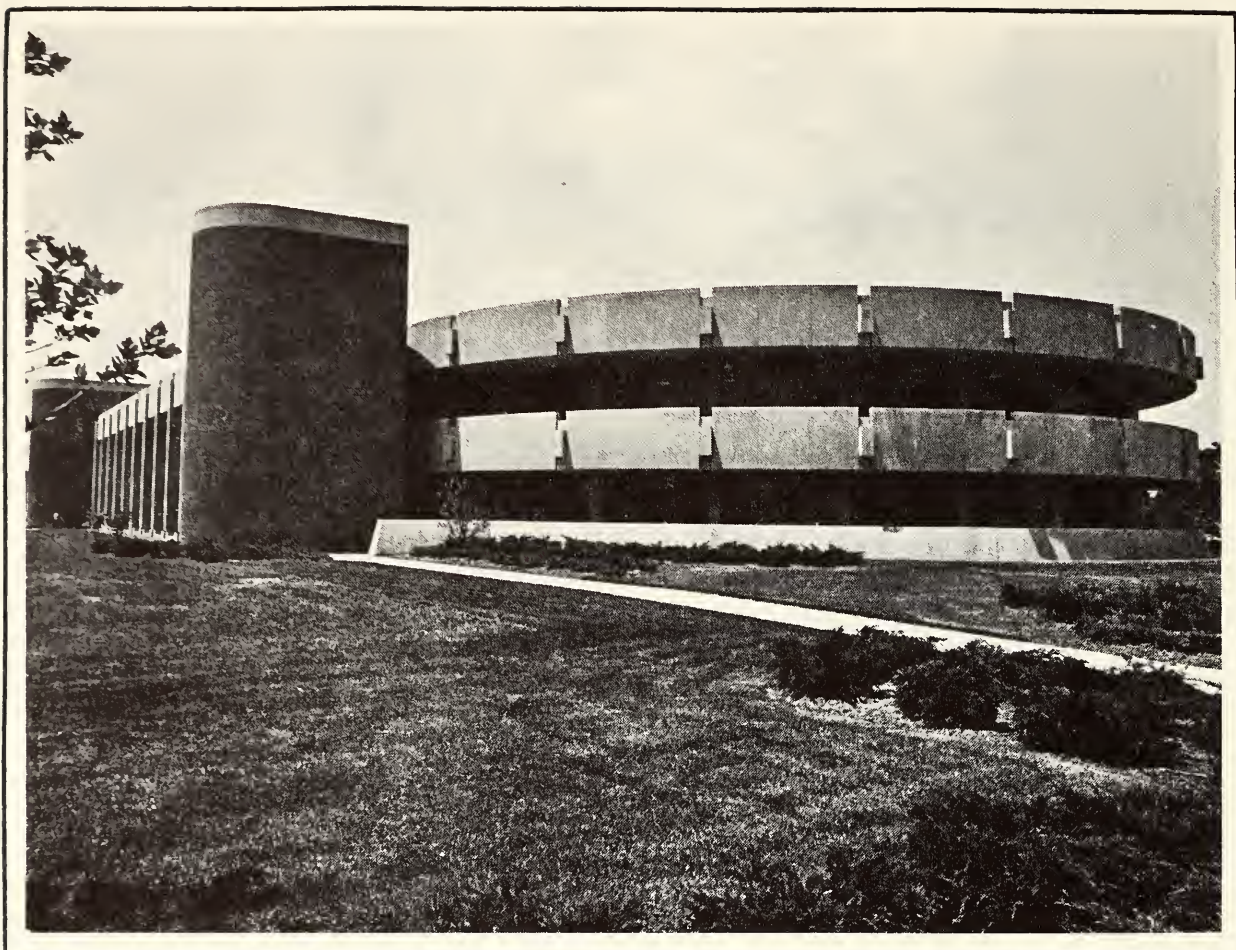
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The Indiana Comparative Fault Act at First (Lingering) Glance

LAWRENCE P. WILKINS*

I. INTRODUCTION

The principle of comparative fault will become part of Indiana tort law on January 1, 1985.¹ On that date, an injured party who was partially at "fault"² for his injury will no longer be subject to the complete defense of contributory negligence in a tort action. Instead, a plaintiff whose conduct satisfies the statutory definition of "fault" will be entitled to recover damages reduced in proportion to that fault. If the plaintiff's "fault" is assessed at greater than 50%, however, recovery will be totally barred. The Indiana Comparative Fault Act is, therefore, not a complete acceptance of the comparative fault principle because the common law contributory negligence bar continues to operate for some injured plaintiffs who are not wholly responsible for their injuries. In choosing to relegate contributory negligence to a subordinate role in tort litigation, however, the General Assembly has taken an important step and has brought Indiana in line with forty-one other states,³ the federal government, and every other common law system in the world.

Because Indiana courts have continually deferred to the legislature and have refused to implement comparative fault on their own,⁴ it was

*Professor of Law, Indiana University School of Law—Indianapolis. B.A., The Ohio State University, 1968; J.D., Capital University Law School, 1973; LL.M., University of Texas School of Law, 1974.

¹Act of Apr. 21, 1983, Pub. L. No. 317-1983, 1983 Ind. Acts. 1930 (codified as amended at IND. CODE § 34-4-33-13 (Supp. 1984)).

²The statutory definition of "fault" departs significantly from general common law concepts of fault by including conduct that may not be, strictly speaking, characterized as faulty behavior on plaintiff's part. See *infra* notes 32-46 and accompanying text. In this Article, reference to a finding of "fault" under the Indiana Comparative Fault Act will be distinguished from common law fault by the use of quotation marks.

³Those forty-one states include Georgia and Tennessee, two states with rather unique approaches to comparative fault. See the discussions of those jurisdictions in V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 1.5, at 18-19 (1974); H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT §§ 4.1, 4.3 (1978).

⁴State v. Ingram, 427 N.E.2d 444, 448 (Ind. 1981); Rhinebarger v. Mummert, 173 Ind. App. 34, 41, 362 N.E.2d 184, 187 (1977) (Buchanan, J., concurring).

inevitable that the legislature would finally act. The increasing acceptance of apportionment of liability commensurate to fault in other states during the 1960's and 1970's had made Indiana one of the last remaining strongholds for the anachronistic doctrine of contributory negligence.⁵ Finally, by 1982, the tide of public policy favoring proportionate liability was strong enough to persuade Indiana legislators that passage of a comparative fault act was necessary.

Although statutory adoption of apportionment of liability may have been inevitable, the precise system accepted by the General Assembly was not. A pure comparative fault system was theoretically feasible, has been the choice in several jurisdictions,⁶ and is the form recommended by the National Conference of Commissioners on Uniform State Laws.⁷ However, political compromises necessary to enact some form of apportionment of liability militated against whatever theoretical chances a pure system may have had. In selecting one of the several available models of modified systems, the Indiana legislature adopted the "greater than 50%" system, the unique features of which this Article will examine. Analysis of Indiana's Act will include: (1) functional considerations, focusing on how the statute will operate and how tort litigation will be affected by its operation⁸ and (2) policy considerations, focusing on whether the apparent effects of the Act are intended and whether those effects are desirable.⁹ Because the statute will not completely displace common law tort principles, the discussion suggests possible interpretations and ramifications of the Act in light of the common law. This Article will demonstrate that these interpretations raise certain questions which warrant immediate legislative attention.¹⁰ This Article will also raise other questions which should be left for resolution through careful consideration in case law.¹¹

II. GENERAL FEATURES OF THE ACT

A. *Operation of the Apportionment Principle*

The Act purports to apply to "any action based on fault"¹² arising

⁵See generally, V. SCHWARTZ, *supra* note 3, § 1.2, at 2-3; H. WOODS, *supra* note 3, at § 1.11.

⁶The following states have adopted, either by statute or judicial decision, a pure form of comparative negligence: Alaska, California, Florida, Illinois, Louisiana, Mississippi, New Mexico, New York, Rhode Island, and Washington. H. WOODS, *supra* note 3, at § 4.2 (1978 & Supp. 1982).

⁷UNIF. COMPARATIVE FAULT ACT § 1, 12 U.L.A. 36 (Supp. 1984) (See Commissioners' Prefatory Note at 35-36) [hereinafter cited as UNIFORM ACT].

⁸See *infra* notes 12-26, 76-85 and accompanying text.

⁹See *infra* notes 27-55, 306-406 and accompanying text.

¹⁰See *infra* notes 56-75, 86-153, 154-162, 199, 306-406 and accompanying text.

¹¹See *infra* notes 81, 86-153, 163-88, 192-98, 206-08, 237-39, 304-05, 449-501 and accompanying text.

¹²IND. CODE § 34-4-33-1(a) (Supp. 1984). Although the statutory language appears

from “injury or death to person or harm to property.”¹³ Apportionment applies whether the basis of liability is negligent conduct or willful, wanton, or reckless conduct.¹⁴

In any two-party action to which the Act applies, the statute requires the trial judge to instruct the jury to first assess the “percentage of fault of the claimant, of the defendant and of any person who is a nonparty.”¹⁵ If the jury assesses the claimant’s fault at greater than 50% of the “total fault,” the judge will instruct the jury to return a defendant’s verdict.¹⁶ However, if the claimant’s fault is assessed at 50% or less, the judge will instruct the jury to ascertain the total amount of damages without regard to the claimant’s fault.¹⁷ Finally, the jury will multiply the total damage figure by the percentage of fault assessed to the defendant in the first step and render a verdict for the claimant equal to the product of that multiplication.¹⁸

In many cases, the “total fault” will simply be divided between the plaintiff and the defendant. For example, if the plaintiff has incurred a \$10,000 injury, and the plaintiff has been assessed 30% of the fault, then the jury will multiply \$10,000 by the defendant’s 70% fault and enter a verdict against the defendant for \$7,000. If the plaintiff had been found free of “fault,” then the verdict would have been for the full \$10,000. If the plaintiff had been assessed 51% of the fault, then the “greater than 50% rule” would totally bar the plaintiff’s recovery.

When multiple actors are involved, the procedure for rendering a verdict is similar. The jury first determines the percentage of fault for each actor, including the plaintiff.¹⁹ If the plaintiff’s “fault” is greater than 50% of the “total fault” which caused the harm, then the defendants are not liable.²⁰ If the plaintiff’s “fault” is 50% of the “total fault” or less, then the jury will determine its verdict as described in the two-party situation.²¹ In certain cases, the jury is instructed to determine the “fault” of “nonparties” as well as those named in the action.²² Consequently, in a proper case, the combined percentages of the named

all-inclusive, it is modified by section 34-4-33-8 which states that the Act “does not apply in any manner to tort claims against governmental entities or public employees” brought under the Indiana Tort Claims Act. *See infra* notes 189-99 and accompanying text.

¹³IND. CODE § 34-4-33-1(a).

¹⁴*Id.* § 34-4-33-2(a).

¹⁵*Id.* § 34-4-33-5(a)(1). As will be seen in later discussion, the jury will consider the “fault” of a “nonparty” only in certain cases. *See infra* text accompanying notes 200-41.

¹⁶IND. CODE § 34-4-33-5(a)(2).

¹⁷*Id.* § 34-4-33-5(a)(3).

¹⁸*Id.* § 34-4-33-5(a)(4).

¹⁹*Id.* § 34-4-33-5(b)(1).

²⁰*Id.* § 34-4-33-5(b)(2).

²¹*Id.* § 34-4-33-5(b)(3), (b)(4).

²²*Id.* § 34-4-33-5(b)(1).

parties may total less than 100%. A "nonparty" is anyone subject to liability for the plaintiff's injury who has not been joined in the action.²³ The definition specifically excludes the plaintiff's employer. The "nonparty" definition was added by the 1984 amendments²⁴ in an attempt to clear up a troublesome feature of the original Act concerning the effect an employer's fault would have upon some plaintiffs' right of recovery.²⁵

The jury's assessment of "fault" for persons not named in the action can be crucial even though the named defendant's "fault" exceeds the fault of the plaintiff. For example, if the plaintiff has incurred a \$10,000 injury and two defendants have each been assessed 10% of the "fault" and one nonparty actor has been assessed 20% of the "fault," then the named defendants will not be liable. The plaintiff's 60% "fault" is greater than 50% of the "total fault" involved in the incident which caused the injury. However, if two nonparty actors have each been assessed 20% of the "fault," and the named defendants' "fault" has been assessed at 10% each, then the plaintiff's 40% "fault" is short of the "greater than 50%" threshold and the plaintiff will recover from the named defendants. Even though the combined percentages of the named defendants is only 20% and the plaintiff was assessed more "fault" than these defendants, each defendant is liable for \$1,000.

The Act's fundamental concept is that a plaintiff who is in some way partly responsible for his own injury is entitled to compensatory damages reduced in proportion to the plaintiff's own fault. The concept is not applicable, however, to all cases. If the plaintiff has contributed a major element of culpable conduct, then recovery will be barred altogether. That major element of fault is established at "greater than 50% of the total fault" producing the injury.²⁶ The Act, therefore, is not a clear break from the traditional contributory negligence doctrine because the door of recovery is opened only for some plaintiffs who are partly responsible for their injuries.

The legislature should open the door completely rather than continue half-heartedly embracing comparative fault. The conceptual ambivalence of a statute that adopts the apportionment principle while retaining the total bar of contributory negligence is inherently complex, and fraught with potential for confusion. Even though most legislatures have preferred adoption of some modification of the pure comparative fault principle,²⁷ no feature of the "greater than 50% rule" is legally more attractive

²³*Id.* § 34-4-33-2(a).

²⁴Act of Mar. 5, 1984, Pub. L. No. 174-1984, 1984 Ind. Acts 1468.

²⁵See *infra* notes 200-34 and accompanying text.

²⁶IND. CODE § 34-4-33-5(a)(2), (b)(2).

²⁷H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT §§ 4.3-4.5 (1978 & Supp. 1982).

than the pure form. Once the apportionment principle has been accepted, limiting the principle to cases where defendants' acts are greater than 49% of the fault cannot be justified on grounds of administrative efficiency. Where a percentage point makes such a drastic difference, litigation is more likely to arise from the complexities inherent in this mongrel offspring of the apportionment principle and the contributory negligence principle than would arise from either of the two parent systems. Furthermore, much of the value of expanding the compensatory function of tort law, which has been an important justification for the move to comparative fault, is lost in the adoption of the "greater than 50% rule."²⁸

The Indiana Act borrows heavily from the Uniform Comparative Fault Act adopted by the National Conference of Commissioners on Uniform State Laws.²⁹ The Uniform Act contemplates a pure system. Unfortunately, the Indiana General Assembly disregarded the main thrust of the model upon which it relied for many of its provisions. Apparently choosing to ignore the experiences of other jurisdictions which have successfully employed a pure system, it succumbed to the politically more attractive incremental step³⁰ and selectively adopted only part of the Uniform Act's language.

Limited as it is, the Indiana Act is, nevertheless, a step in the right direction. If political compromise was necessary to initiate the reform, the Act must be viewed as a success. Yet, the Act must also be considered a limited experiment with fault apportionment—an experiment which has long been considered a success in other settings. If it succeeds in Indiana it may lead to more comprehensive reform.

Important as the statute may be as an evolutionary step toward pure comparative fault, it contains some flaws, even as a modified system. Some of those flaws are produced by the cafeteria-style method of selecting parts of the Uniform Act and rejecting other parts.³¹ There are other flaws which are more fundamental and bear no relationship to Uniform Act provisions.³² Some flaws can and should be promptly corrected by the legislature. Others can await and may benefit from the slow tempering effects of the judicial process.

²⁸Expansion of the compensatory function under the "greater than 50%" rule may even prove to be largely illusory if the speculation that juries have long been applying an informal comparative negligence principle is true. J. ULMAN, *A JUDGE TAKES THE STAND* 30-32 (1933). Cf. J. FRANK, *COURTS ON TRIAL* 120-21 (1949). See also Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 508 (1962).

²⁹UNIFORM ACT, *supra* note 7, § 1, at 36.

³⁰See generally Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 494 (1953).

³¹See *infra* notes 35-75, 151-53, 306-406 and accompanying text.

³²See *infra* notes 86-150, 190-99 and accompanying text.

B. Section 1: Coverage

Like the Uniform Act, the Indiana version governs "any action based on fault that is brought to recover damages for injury or death to person or harm to property."³³ Although the phrase is inelegant, the coverage of the Act seems fairly clear. Both Acts fail, however, to specifically include injuries to relational interests. If one assumes that the omission is attributable to the common failure to address these interests, was unintentional, and that the Act applies to such cases, no problems should arise.³⁴ No policy supports a system which would permit apportionment of fault when a plaintiff proves destruction of a fence, for example, but would deny apportionment of fault when a plaintiff proves destruction of a family relationship. The statute's coverage language should have simply included "any action based on fault" and avoided specifying the types of actions covered. The language is serviceable, though, as long as interpreting courts avoid a rigid construction which excludes tort actions not expressly and specifically excluded by the statute.

C. Section 2: "Fault" Defined

The types of actions that the Indiana Comparative Fault Act covers are obscured by the Act's definition of "fault."³⁵ The basic definitional stock is the Uniform Act's language, but that stock has been sprinkled with Indiana legal ingredients which add a distinct flavor to the finished potion. Both Acts define "fault" to include any act or omission that is negligent or reckless toward person or property; however, the Indiana Act adds "willful" and "wanton" to the types of acts and omissions covered by the fault definition.³⁶ The Indiana version also engrafts the phrase "but does not include an intentional act"³⁷ onto the definition, perhaps because of a concern that the addition of "willful" or "wanton" might produce confusion. Both Acts include "unreasonable assumption of risk not constituting an enforceable express consent,"³⁸ but following that phrase, the Indiana Act includes "incurred risk."³⁹ The Uniform Act includes conduct that "subjects a person to strict tort liability,"

³³IND. CODE § 34-4-33-1(1)(a).

³⁴While a wrongful death claim or loss of consortium may well arise from "the injury or death of a person," the purpose of the action is to vindicate the invasion of the plaintiff's relational interest in the person hurt or killed. See Green, *Protection of the Family Under Tort Law*, 10 HASTINGS L.J. 237 (1959).

³⁵IND. CODE § 34-4-33-2(a).

³⁶Compare UNIFORM ACT, *supra* note 7, § 1(b), at 36, with IND. CODE § 34-4-33-2(a).

³⁷IND. CODE § 34-4-33-2(a).

³⁸*Id.*; UNIFORM ACT, *supra* note 7, § 1(b), at 36.

³⁹IND. CODE § 34-4-33-2(a).

“breach of warranty,” and “misuse of a product for which the defendant otherwise would be liable.”⁴⁰ The Indiana Act omits these three phrases from the definition.⁴¹ Finally, both Acts contain the phrase “unreasonable failure to avoid an injury or to mitigate damages.”⁴² In the process of attempting to identify the situations to which the Act applies, this “patchwork quilt” definition has clouded the general concept of fault.

The first section, for example, invokes the apportionment principle in “any action based on fault,”⁴³ a phrase which would cause most attorneys to expect intentional wrongdoing to be included by virtue of the heavy content of fault in such torts. The Act, however, has defined “fault” as something less than the common law concept of fault, since section two specifically excludes intentional acts.⁴⁴ This exclusion seems curious. The Act is, after all, a comparative *fault* statute, not a comparative *negligence* statute. The limitations may be partially justified by viewing it as a legislative attempt to add some balance to the Act’s operation upon plaintiffs’ and defendants’ interests. By excluding intentional conduct from the definition, the legislature has denied the benefits of apportionment to one class of defendants who have brought major contributions of fault into the injurious incident.⁴⁵ The effect is similar to the denial of apportionment to plaintiffs who have contributed major proportions of “fault” to the incident.⁴⁶

Significant potential for confusion enters this mixed-bag definition of “fault” with the inclusion of “incurred risk.”⁴⁷ Some risk-incurring conduct, whether intentional or not, may not be faulty. The same

⁴⁰UNIFORM ACT, *supra* note 7, § 1(b), at 36.

⁴¹The Indiana General Assembly deleted the phrases “subjects a person to strict tort liability,” “breach of warranty” and “misuse of a product for which the defendant otherwise would be liable” which appeared in the state’s original Comparative Fault Act. Compare Act of Apr. 21, 1983, 1983 Pub. L. No. 317-1983, Sec. 1, § 2(a), 1983 Ind. Acts. 1930, with Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2(a), 1984 Ind. Acts 1468 (codified at IND. CODE § 34-4-33-2(a) (Supp. 1984)).

⁴²IND. CODE § 34-4-33-2(a); UNIFORM ACT, *supra* note 7, § 1(b), at 36.

⁴³IND. CODE § 34-4-33-1(a).

⁴⁴A certain measure of “Humpty-Dumptying” has applied to this definition of “fault” THE FUNDAMENTALS OF LEGAL DRAFTING 13, 101-04, 106, 108-09 (1965).

⁴⁵The limitation presumably also applies to plaintiffs whose intentional acts produce the injury. To the extent that the legislature contemplated the phrase as a limitation on plaintiffs, the balancing justification loses its force. Nevertheless, the limitation remains consistent with the notion that major contributions of fault by plaintiffs carry full accountability.

⁴⁶This balancing argument can be pressed too far. The point raised in the previous footnote illustrates one instance where it weakens. Outside the context of the definitional exclusion of intentional acts, the balance clearly favors tortfeasors. Compare a tortfeasor who is 60% at fault with a plaintiff (in a different case) who is 60% at fault. The tortfeasor is liable in proportion to her fault. The plaintiff must accept total accountability for his injury.

⁴⁷IND. CODE § 34-4-33-2(a).

proposition is true with respect to assumed risk, but the legislature included only "unreasonable assumption of risk not constituting an enforceable express consent" in the definition.⁴⁸ Common law concepts of fault do not easily embrace the notions that "fault" includes some but not all faulty conduct, and that the exclusion of intentional acts may not mean what it says. Still, if one views the definition section as merely a description of the circumstances that trigger apportionment, one can comprehend that certain sets of circumstances invoke the apportionment principle while others do not. However, viewing the statute as such a description is something entirely different from accepting the Act's "fault" as a redefinition of fault. Section two does not redefine fault at all, but should be viewed rather as a more detailed statement of section one's coverage.⁴⁹ The legislature should have combined sections one and two into a single coverage section rather than attempting to construct a special codified definition of fault.

If the only effect of section two were that one would have to reconstruct the section to understand it, then perhaps an informal understanding among judges and practitioners would foreclose difficulty in application. However, reading the first two sections in conjunction induces an interpretation that is at odds with the purported function of the Act and raises a spectre of misunderstanding. Strange as it may seem, the ultimate conclusion of that interpretation would be that the Act does not require comparison of fault, even though it declares otherwise, but rather that the Act requires the comparison of causation. This interpretation is produced by a combination of two otherwise unrelated factors. The first is the relatively difficult task of quantifying and apportioning fault when compared with the task of quantifying and apportioning causation. The second is the Act's attempt to control the types of actions and defenses to which apportionment applies by defining "fault" in a way that distorts the concept of fault.

Because the concept of fault is blurred by section two, one construing the statute may be inclined to search for a unitary concept enveloping

⁴⁸*Id.* This feature of the Act is discussed *infra* at notes 306-406 and accompanying text. It is sufficient here to note that the definition of fault includes contradictory elements.

⁴⁹The section might be reconstructed, for example, into separate lists of actions and defenses, like the following, which invoke the apportionment principle:

Sec. 1 (a) This chapter governs any action based on:

- (1) negligence, or
- (2) willful, wanton or reckless misconduct that is brought to recover damages for injury or death to persons or harm to property.
- (b) This chapter governs any defense based on:
 - (1) contributory negligence,
 - (2) willful, wanton or reckless misconduct,
 - (3) unreasonable assumption of risk or incurred risk not constituting an enforceable express consent, or
 - (4) unreasonable failure to avoid injury or to mitigate damages.

the new formulation without disturbing the traditional meanings of fault. The suggestion that section two could be understood to be simply a list of actions and defenses is an example of this search for reconciliation.⁵⁰ Conceptualizing a system of accountability is extremely difficult when that system purports to apportion liability on the basis of fault but fails to subject faulty actions to apportionment while affecting some actions that are faultless. The statement that the following propositions can both be true is almost incomprehensible: (1) intentional wrongful acts are not subject to apportionment, and (2) some intentional and perhaps even non-wrongful acts trigger the Act. Consequently, the difficulty in understanding the Act's definition of "fault" may be so great that courts, attorneys, and jurors will seize upon causation⁵¹ as the reconciling concept and will compare the parties' causal contributions to the injury. A jury would accordingly assign liability proportionate to each actor's share of causation. Such a verdict would declare, in essence, that the plaintiff caused $X\%$ of his own injury and that the defendant caused $Y\%$ of the plaintiff's injury.

This cause-comparison interpretation should be rejected because it can easily produce damage awards which are not commensurate with the actors' contributions of fault. Causation factors may remain constant even though fault factors vary between similar fact situations. A pair of hypothetical cases illustrate this problem. In both cases the following facts exist: The plaintiff is a pedestrian who ran into the street and was struck by a car; the car was driven by the defendant; the accident was caused by the defendant's failure to watch for pedestrians and the plaintiff's failure to watch for automobiles; each party's behavior was an equal cause (50% each) of the plaintiff's injuries. In the first hypothetical, the plaintiff dashed into the street to save a young child, and the defendant was, on a dare, driving with her eyes closed. If the jury employs cause-comparison, it will reduce the plaintiff's damages by 50%. In the second case, the plaintiff was playing a daredevil game in which he tried to run as close to oncoming cars as possible, and the defendant's eyes were momentarily averted by a firecracker exploding near her car. Application of cause-comparison would mandate that the plaintiff's award be reduced by only 50% on the logic that each was an equal cause of the injury. Fault comparison should produce drastic differences in these results.⁵²

⁵⁰See *supra* note 49 and accompanying text.

⁵¹This discussion refers to cause-comparison and not to proximate cause. Similar concerns are involved when juries are permitted to make determinations of proximate cause. See *infra* notes 68-75 and accompanying text.

⁵²In the first example, the defendant's fault greatly exceeds that of the plaintiff. Plaintiff's damages, if reduced at all, would be diminished by much less than the 50% necessary if cause-comparison is utilized. Similarly, the defendant's fault in the second

Realistically, a jury might manipulate cause-comparison and not reach the same verdict in both cases, even though theoretically strict cause-comparison would mandate otherwise. The comparative fault system should not rely upon the jury's distortion of the object of the comparison, whatever it might be, to avoid the problems it poses for assigning accountability. Starkly drawn differences between hypothetical cases such as those just posed may not raise much concern. A cause-comparison approach poses the very real danger, however, that a party whose *fault* is minimal will bear a disproportionate share of liability because his proportion of the *cause* is great.

The Act's suggested jury instructions state:

The jury shall determine the percentage of fault of the claimant, of the defendant, and of any person who is a nonparty. The percentage of fault figures of parties to the action may total less than one hundred percent (100%) if the jury finds that fault *contributing to cause* the claimant's loss has also come from a nonparty or nonparties.⁵³

This jury instruction is insufficient to prevent the jury from applying cause-comparison, and in fact even suggests that it adopt cause-comparison. The instruction should be revised to remove the reinforcement for cause-comparison.⁵⁴ The Act already provides that "legal requirements of causal relation apply to: (1) fault as the basis for liability; and (2) contributory fault."⁵⁵ If the trial court carefully adhered to this admonition and the phrase "fault contributing to cause" were removed from the instruction there would then be no real reason to believe that the jury would be permitted to assign "fault" where no cause-and-effect relationship existed between the alleged culpable behavior and the injury. The point to be made here is not that the jury should not be instructed on matters of causation. It is, rather, that matters of causation should be carefully kept separated from the comparison of "fault." The Act permits modification of the statutory instructions by agreement of the parties. Absent legislative revision, counsel should submit instructions which carefully separate the issues of causal contribution and comparison of fault, and which emphasize the proper task of fault apportionment. For now, attorneys and courts must bear the responsibility for instructing juries to base their calculations on fault comparison to insure that juries are measuring the parties' fault, not their causation.

example is insignificant. If fault-comparison is employed, the plaintiff's award would be zero.

⁵³IND. CODE § 34-4-33-5(a) (emphasis added).

⁵⁴The 1984 amendments improved the suggested jury instructions by striking the phrase "proximately contributing to cause" in another part of those instructions, but the idea of contribution to cause remains in the portion quoted in the text of note 53, *supra*.

⁵⁵IND. CODE § 34-4-33-1(b).

D. Sections 3 and 4: Statement of the Comparative Fault Principle

1. *Form and Substance: Some Problems.*—Sections three and four,⁵⁶ the Act's main substantive clauses, are excellent examples of patchwork drafting and its resultant problems. Section three was essentially borrowed from the Uniform Act and, consequently, contains well-considered language which details the comparative fault principle.⁵⁷ Section four expresses Indiana's modification of that principle.⁵⁸ Had the Indiana legislature adopted the commissioners' suggestions for a model modified system,⁵⁹ this section would be clear and concise. Under the commissioners' system, sections three and four would have been combined into a direct statement of modified comparative fault.⁶⁰ The Indiana Act's technique of stating the operative concept of its formula as an exception to a principle which it does not fully embrace invites misunderstanding and interpretative arguments.

A troublesome aspect of section four is that the claimant's recovery is barred if his "fault is greater than the fault of *all persons* who proximately contributed to the claimant's damages."⁶¹ The commissioners proposed a bar if the claimant's fault is "greater than the *combined* fault of *all other parties* to the claim."⁶² Whereas the commissioners' version clearly requires that the fault of other actors be considered a single quantity, the Indiana Act suggests, by omitting the word "combined," that the claimant is barred if *each* actor's fault is not greater than the claimant's fault.⁶³ However, the Indiana jury instructions do require a comparison of the claimant's fault to the "*total* fault involved in the incident."⁶⁴ In light of these instructions, the legislature probably intended that the claimant's fault would be measured against the total or combined fault of all other actors. The substantive sections, however, should not rely upon later nonsubstantive sections for clarification, especially when the latter sections are subject to modification by agreement of the parties.

Section four is also needlessly complex. The section divides actions

⁵⁶IND. CODE §§ 34-4-33-3, -4.

⁵⁷*Id.* § 34-4-33-3.

⁵⁸*Id.* § 34-4-33-4.

⁵⁹UNIFORM ACT, *supra*, note 7, § 1, at 36, 38.

⁶⁰*Id.*

⁶¹IND. CODE § 34-4-33-4(a) (emphasis added).

⁶²UNIFORM ACT, *supra*, note 7, § 1(a), at 36 (emphasis added).

⁶³If this interpretation is accepted, then the claimant's recovery will be barred in some cases where the claimant would recover under the commissioners' "combined fault" language. For example, where the claimant's fault is 40% and the fault of three tortfeasors is 20% each, the claimant's 40% is greater than the fault of each tortfeasor. Consequently, the claimant's recovery would be barred under this interpretation. However, the claimant's 40% fault is less than the combined fault of the three tortfeasors. Thus, under the commissioners' version, the claimant would clearly be entitled to apportioned recovery.

⁶⁴IND. CODE § 34-4-33-5(a)(2), (b)(2) (emphasis added).

based on fault into three classes: those brought against (1) a single defendant, (2) two or more defendants who may be treated as a single party, and (3) two or more defendants.⁶⁵ These three classes seem to cover all imaginable actions based on fault, yet the section separates the third class from the first two and repeats the modification of the apportionment principle. The same division and repetition appears in the suggested jury instructions. Since no intention to treat the various classes of defendants differently is apparent from the language of section four or the jury instructions,⁶⁶ this section would have been more clear and concise if it had simply stated that the modified apportionment principle applied to all actions based on fault.⁶⁷

2. *Problems of "Proximate Contribution"*.—Both subsections of section four contain the phrase, "claimant is barred from recovery if his contributory fault is greater than the fault of all persons whose fault *proximately* contributed to the claimant's damages."⁶⁸ The suggested jury instructions, however, nowhere mention "*proximate* contribution," and in fact a phrase containing those words was deleted from those instructions in the 1984 amendments to the Act.⁶⁹ This discrepancy suggests that the proximity of contribution is to be determined by the court and not by the jury. Section one's admonition that "[i]n an action brought under this chapter *legal* requirements of causal relation apply to: (1) fault as the basis for liability; and (2) contributory fault"⁷⁰ bolsters this

⁶⁵*Id.* § 34-4-33-4.

⁶⁶The original Act contained a class of defendants called "primary" defendants, who were defendants whose liability was "based upon [their] own alleged act, omission, or product and not based upon [their] relationship to another defendant." Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 2(a), 1983 Ind. Acts 1930. The definition and tripartite classification of section four created doubts about whether a lawsuit against only nonprimary defendants (as in the case of suit against an employer on a theory of vicarious liability) was covered by the apportionment principle. The 1984 amendments struck all references to "primary" defendants, Acts of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1-3, §§ 2, 4, 5, 1984 Ind. Acts 1468, 1468-69, and removed the cloud, but the 103rd General Assembly missed the opportunity to concisely and precisely state the modification principle.

⁶⁷A better approach would have been to actively impose the principle upon cases for which it is intended to operate. For example:

In actions governed by this chapter, if the claimant's fault is not greater than the combined fault of all other persons who contributed to claimant's injury, the judge or jury shall diminish the amount awarded as compensatory damages to the claimant in proportion to claimant's fault.

This suggested arrangement also borrows from the Uniform Act, but affirmatively states the principle in a way that acts upon the people charged with the responsibility for carrying it out. See Kirk, *Elements of Legal Drafting*, 1977 *A.B.A. Comm. Legal Drafting; Int'l Seminar & Workshop on the Teaching of Legal Drafting* 225, 240.

⁶⁸IND. CODE § 34-4-33-4(a), (b) (emphasis added).

⁶⁹*Compare* Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 5(a)(1), (b)(1), 1983 Ind. Acts 1930, 1931-32, *with* Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 3, § 5(a)(1), (b)(1), 1984 Ind. Acts 1468, 1469-70 codified at (IND. CODE § 34-4-33-5(a)(1), (b)(1) (Supp. 1984)).

⁷⁰IND. CODE § 34-4-33-1(b) (emphasis added).

suggestion if the phrase means anything more than that anyone asserting the fault of another party must establish a cause-in-fact connection between the fault asserted and the alleged injury. If the Act requires that the court make some determination of proximate causation prior to submitting the case to the jury, the jury should not be permitted to apportion the "fault" of those actors whose fault did not proximately contribute to (proximately cause) the plaintiff's injury.

Complications can quickly set in if the court and counsel do not carefully separate matters of proximity of contribution from the case, and determine those issues prior to the jury's apportionment of "fault." To illustrate, assume a suit brought by *P* against actors *A*, *B*, and *C*. If *C*'s conduct, even though substandard and a causal factor in *P*'s injuries, does not satisfy the requirement of "proximate contribution," that conduct should not be considered by the jury in its computation of "fault." If the court does not carefully instruct the jury to disregard *C*'s conduct in its deliberations, it may very well include that conduct in its apportionment, since the suggested instructions do not alert the jury to the issue of proximity.⁷¹ If *C* had been dismissed from the case and the jury had "reinstated" her for purposes of its calculations, however, that fact should be quickly ascertained and corrective measures taken under section nine of the Act.⁷²

If the court postpones a ruling on proximate contribution, permitting the jury to apportion "fault" taking *C*'s conduct into account, some difficulties will arise in later removing *C* from the case. For example, assume that the jury returned findings that *P* was 33% at "fault," *A* was 12%, *B* was 15%, and *C* was 40%. Under these findings, *P*'s "'fault' is not greater than fifty percent . . . of the total fault involved in the incident."⁷³ When it is determined that *C*'s "fault" did not *proximately contribute* to *P*'s injuries, then *P*'s "fault" *does* exceed 50% of the "fault of all persons whose fault proximately contributed" to the injury. All of the "proximately contributing fault" before the court is represented by *P*'s, *A*'s and *B*'s conduct. If the relative proportions of fault found by the jury are any guide, then an extrapolation can be made to determine the percentages of fault of each of those three parties. To do that, all of the contributing conduct, whether "proximate" or not, is first taken into account and converted to the

⁷¹Indeed, the instructions require the jury to take the "fault" of a "nonparty" into account. In a case where *C* has not been sued or has been dismissed, her "fault" may slip back into the case through the "nonparty" language of the instructions. For a discussion of the nonparty defense, see *infra* text at notes 200-34.

⁷²IND. CODE § 34-4-33-9. This section is discussed *infra* at notes 83-85 and accompanying text.

⁷³The quoted language is taken from the proposed jury instructions, IND. CODE § 34-4-33-5(a)(2), (b)(2), discussed *infra* at notes 77-151 and accompanying text.

numeric value of 100. Then, removing *C*'s 40/100 "nonproximately contributing" conduct leaves 60/100 remaining as the "proximately contributing" conduct. Ratios produce the conclusion that *P*'s "fault" is 33/60 or 55%, *A*'s is 12/60 or 20%, and *B*'s is 15/60 or 25%. This conclusion means that *P*'s action should be barred for having exceeded 50% of the fault proximately contributing to the injury. Whether the jury would have reached that conclusion on its own had it been instructed to disregard *C*'s conduct is a matter of extreme speculation.

This analysis suggests yet another reason for avoiding the determination of proportions of *fault* as if they are proportions of *causal contribution*. In the hypothetical case just related, all of the parties contributed to the events leading to the plaintiff's injury. Each is connected in the cause-and-effect relationship necessary to establish an element of the plaintiff's cause of action. Yet, because of the operation of the particular proximate cause formula applicable to the circumstances,⁷⁴ *C*'s conduct is not part of the "total fault" from which the ultimate proportions are to be drawn. To prevent confusion, the jury's consideration of the case must be carefully controlled to assure that it understands why *C*'s acts are to be removed from the apportionment decision. The suggested jury instructions of the Act appear to be directed toward ordinary, uncomplicated cases, and should not be routinely adopted for multiple party cases complicated with issues of "proximate contribution."

Assuming that the legislature did not intend that the term "proximate contribution" have some legally significant effect or that the meaning of the phrase be equivalent to "proximate cause" does not eliminate the problems just discussed. Conscientious counsel will likely notice and use the difference in phrasing between the substantive clauses of section four and the suggested jury instructions when the interests of their clients turn upon competing interpretations. The controversy raised by differences in interpretation may also lead to confusion in jury argument and deliberation. If the phrase was not intended to carry legal significance, it should be deleted. After all, the word "proximate" is freighted with quite enough confusion and controversy in the context of proximate cause without importing it into the realm of comparative fault.⁷⁵

⁷⁴See generally, L. GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 236 (4th ed. 1971); 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 20.1 (1956).

⁷⁵See the Preface to L. GREEN, *supra* note 74. The chart he attempted to draw for correcting the judicial course, in the twenty-nine years intervening between the publication of his book and the Harper and James treatise, and the forty-four years between his statements and Prosser's fourth edition, had apparently not successfully steered the judicial mind completely free of dangerous shoals.

E. Sections 5, 6, and 9: Controlling the Jury

1. *Introduction.*—Apportionment of “fault” and the consequent allocation of recoverable damages is a complex task dependent upon explicit findings of percentages, careful determination of “unadjusted” damages, and accurate computations in applying the percentages to the “unadjusted” damages. A much greater potential for jury confusion and error exists in a comparative fault system than in the traditional system where the liability issue is answered yes or no, and damages remain “unadjusted.” Sections five and six of the Act attempt to reduce potential confusion by setting out detailed instructions and requirements concerning the verdict form. Section nine spells out court instructions in the event of jury computational errors. These sections comprise the procedural implementation for the substantive provisions of sections three and four.

Because no single, ideal procedure for administering a system of apportionment exists, problems may arise from these pronounced procedures. For example, a series of decisional and computational steps satisfactory in one fact situation may be a source of difficulty with different facts and a different jury. Determining the percentages of “fault” and the ultimate damages may be an easy task in a simple case where liability is not hotly contested. But a case which involves multiple parties, complex damages issues, and vigorously refuted fault allegations may require a wholly different means of organizing the case for the jury’s consideration. The ensuing sections will discuss potential problems with the legislature’s detailed jury controls.

Because sections five and six control the jury by shaping the format of its decisions, they may be viewed as having a substantive effect. For example, the instructions may be interpreted as an abolition of joint and several liability. The subsequent discussion will consider first the abolition interpretation and the arguments supporting that view, based upon the premise that separate verdicts against multiple defendants mean several⁷⁶ but not joint liability. Next, the discussion will address an interpretation favoring the retention of joint and several liability, based upon the premise that the provisions of the Act do not purport to affect joint liability. Finally, even if the jury instructions are construed as intending to abolish joint and several liability, the doubtful validity of those provisions is discussed.

2. *The Alternative Instructions.*—The Act prescribes a set of instructions for single defendant cases (or multiple defendants who may be treated as a single party),⁷⁷ and another set for all other multiple defendant cases.⁷⁸ The requirements of the two sets are virtually the

⁷⁶See BLACK’S LAW DICTIONARY 1232 (5th ed. 1979).

⁷⁷IND. CODE § 34-4-33-5(a).

⁷⁸*Id.* at § 34-4-33-5(b).

same.⁷⁹ In each case the jury is instructed to perform the following tasks in the order presented:

- (1) determine the percentage of fault for each party and nonparty;
- (2) return a verdict for defendant(s) if plaintiff's fault is found to be greater than 50%;
- (3) determine the total damages disregarding contributory fault if plaintiff's fault does not exceed 50%;
- (4) enter a verdict for the amount(s) obtained by multiplying the percentage(s) of fault of the defendant(s) by the damages figure obtained in step (3).⁸⁰

A potential problem lies in the required order of the jury's findings. First computing the percentages of the parties' "fault" is sensible when the plaintiff's contributory fault is strong and little or no rebuttal is offered by the plaintiff because needless expenditure of time and effort in computing damages will be avoided if the plaintiff's "fault" is found to be greater than 50%. The number of such cases which will come to litigation, however, is not likely to be large. The majority of cases will very likely be ones in which fault is a close and vigorously contested issue. In such cases, counsel should consider whether the jury might better make a computation of damages with their minds uncluttered by thoughts of who is at fault and in what proportions.⁸¹ Juries are *supposed* to understand that they are to make independent findings on the issues of fault and damages, but some juries in trials involving difficult assessments of fault may be unable to fully disregard a party's culpability when assessing damages.

Of course, juries' deliberations on damages are not *always* going to be tainted by prior determinations of fault. The problem is the legis-

⁷⁹There are minor differences in the number of nouns, but the two sets of instructions are in large part redundant. The main difference lies in the language of section 5(b)(4), which requires a jury to:

enter a verdict against each such defendant (and such other defendants as are liable with the defendant by reason of their relationship to such defendant) in the amount of the product of the multiplication of each defendant's percentage of fault times the amount of damages as determined under subdivision (3).

Section 5(a), which pertains to single defendants and multiple defendants treated as a single party, is written in the singular. The drafter apparently wanted to avoid confusion about how the verdicts were to be computed in a multiple defendant case (which might include some defendants who would be treated as a single party), and set out separate and complete sets of instructions. The significance of the language employed in section 5(b) to the joint and several liability issues is discussed *infra* at notes 90-91, 104-08 and accompanying text.

⁸⁰IND. CODE § 34-4-33-5(a), (b).

⁸¹The Indiana Act's suggested instructions essentially parrot the language of the Uniform Act, except that the Uniform Act's version states general guidelines for the court rather than instructions for the jury and puts the finding of damages first in the order. UNIFORM ACT, *supra* note 7, § 2, at 39.

lature's presumption that those deliberations will *never* be tainted. Therefore, before acquiescing in the use of the Act's proposed instructions, counsel should consider carefully whether the tailored instructions will keep the fault and damage issues separate. If a case requires varying the order of determinations, the jury should be admonished not to depart from the instructed order. The findings on damages should be returned to the court as soon as made. Then the jury should deliberate on fault. This sequence avoids possible adjustments by the jury once they see the actual dollar amounts for which each party is responsible.

3. *Errors in Computation.*—The fourth subsection of the instructions directs the jury to render its verdict as the product of the multiplication of the defendants' fault percentages and the "unadjusted" damages figure.⁸² Section nine of the Act prescribes procedures for when errors are detected in the jury's calculations.⁸³ The jury will be informed that there is an error, the error(s) will be pointed out, and the jury will be returned to the jury room "to correct the inconsistencies."⁸⁴ Under section nine, the jury is not bound by the findings in the erroneous verdict when correcting its error.⁸⁵

4. *Joint and Several Liability: The Opposing Interpretations of the Multiple Defendant Jury Instructions.*—One of the Act's most controversial features is its purported effect of abolishing joint and several liability. Although the Act does not explicitly address joint and several liability, the jury instructions relating to multiple defendants may implicitly abrogate the common law doctrine.⁸⁶ The practical effect of the jury instructions, which require individual verdicts, may be that the plaintiff will be unable to reach beyond a verdict amount to hold a defendant responsible for more than her share of assessed "fault." This effect was supposedly one of the "bargaining chips" given up by the proponents in the political compromise necessary to obtain passage of the Act.⁸⁷

In the political arena, give-and-take is an inevitable aspect of the

⁸²IND. CODE § 34-4-33-5(a)(4), (b)(4).

⁸³*Id.* § 34-4-33-9.

⁸⁴*Id.* By including section nine in the 1984 amendments, the legislature avoided some sticky issues that would have arisen when a jury returned a verdict amount that did not agree with the percentage and the "unadjusted" damages figure. For example, the issue of whether the percentage figures or the final verdict amount should control would surely arise. A question of who would correct and how the correction would be made would also arise.

⁸⁵IND. CODE § 34-4-33-9.

⁸⁶*Id.* § 34-4-33-5(b).

⁸⁷The principal drafter of Senate Bill 287, the Comparative Fault Act, Mr. Edgar Bayliff, has stated that giving up joint and several liability was "what we understood was being achieved at the time . . . if we didn't agree to this we were not going to get the Act." E. Bayliff, remarks at the Indiana Trial Lawyers Association, Seminar on Comparative Fault: "Practicing with Comparative Fault," (Sept. 16, 1983) [hereinafter cited as Remarks of Mr. Bayliff].

legislative process. Legislators may rationally compromise on a point of contention on the ground that the number of people negatively affected by the "given" is much smaller than the number benefited by the "taken."⁸⁸ However, if the Act is ultimately construed as abrogating common law joint and several liability, a significant negative impact upon the right of recovery of some injured parties will result.⁸⁹ That effect is sufficient reason to examine carefully in the judicial arena the purported changes and to discover whether sufficient legal justification exists. The "pros" and "cons" of opposing interpretations of the jury instructions will be examined in the following sections.

a. *The interpretation abolishing joint and several liability.*—Section 5(b) of the Act suggests that in multiple defendant cases the court will instruct the jury to "enter a verdict against each such defendant . . . in the amount of the product of the multiplication of each defendant's percentage of fault times the amount of damages as determined under subdivision (3)."⁹⁰ Since the rule of joint and several liability permits a plaintiff, at his option, to seek recovery for the total amount of damages against any one or all joint tortfeasors, an immediate problem arises in a joint tortfeasor case under the Act. If the plaintiff obtains a damages verdict of \$10,000, for example, and each of the two defendants' "fault" is assessed at 50%, the plaintiff has verdicts against each limited to \$5,000. Any attempt by the plaintiff to obtain satisfaction for more than \$5,000 against a single defendant would be attacked by that defendant as an attempt to reach beyond the plaintiff's verdict. Consequently, the practical effect of the Act is said to be to banish the joint portion of joint and several liability.

Arguments in support of this interpretation begin with the proposition that the abolition effect is certainly consistent with the general principle of the Act, which assures that each defendant's liability will be apportioned to that defendant's culpability as determined by the trier of fact. Since the judgment against the two defendants is, under this argument, limited by the sum-certain verdicts, either defendant will be able to withstand the plaintiff's attempts to hold one of them entirely liable by asserting that her judgment debt does not cover the entire \$10,000. Thus, the equitable principle of fairness, so heavily invoked in favor of the plaintiffs' interests as a justification for the Act, is made applicable to the defendants' interests.

Proponents of the abolition position might also employ a "greater good for the greater number" balancing approach. The proponents' first contention would be that those plaintiffs deprived of the options provided by the old rule represent a small proportion of all those involved in

⁸⁸*See id.*

⁸⁹*See infra* note 148 and accompanying text.

⁹⁰IND. CODE § 34-4-33-5(b).

tort litigation. The second contention would be that the greater benefit of extending the right of at least partial recovery to many whose claims were once totally barred outweighs the relatively slight detriment to the plaintiffs' interest caused by the loss of joint liability. Similarly, since the Act does not require every possible tortfeasor to be brought dragnet-style into a lawsuit by the plaintiff, the plaintiff's burden in the process of apportioning fault among all of those truly at fault is not as great as it might have been. The Act requires that the trier of fact apportion the "fault" of persons not made party to the action,⁹¹ so the plaintiff is not compelled to bring suit against everyone. An incentive to name all persons at fault exists because any attribution of "fault" to a nonparty effectively reduces the plaintiff's recovery in that proportion, but the plaintiff is afforded the option of leaving someone out of the lawsuit if he chooses.

Furthermore, precedent for the abolition of joint and several liability exists in some states which have adopted comparative fault. Five states, for example, have legislatively abolished the doctrine outright.⁹² Three others have abolished it for cases where the plaintiff's fault exceeds the defendants',⁹³ and one has judicially abolished it when the plaintiff is also at fault.⁹⁴

b. The interpretation retaining joint and several liability.—The best evidence pertaining to the issue of retention or abolition of joint and several liability is the language of the Act itself. Since the Act does not explicitly address the subject, the abolition argument is wholly dependent upon a "necessary implication"⁹⁵ contained in that language. Arguments for the retention of the common law rule would, therefore, include assertions challenging the implication's necessity as well as the implication itself.⁹⁶ Further arguments might accept the "necessary implication" interpretation at face value, but challenge the legal and institutional validity of the abolition interpretation.⁹⁷

(1) The substantive provisions.—The starting point for the retention position is that the all-important substantive provisions of the Act,

⁹¹*Id.* § 34-4-33-5(a)(1), (b)(1). There may be a problem with this segment of the instructions in the event that the defendant does not assert a "nonparty defense." See *infra* text accompanying note 213.

⁹²KAN. STAT. ANN. § 60-258a(d) (Supp. 1984); LA. CIV. CODE ANN. art. 2323 (West Supp. 1984); N.H. REV. STAT. ANN. § 507:7a (1983); OHIO REV. CODE ANN. § 2315.19(a)(2) (Page 1981); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1983).

⁹³NEV. REV. STAT. § 41.141(3) (1979); OR. REV. STAT. § 18.485 (1977); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1983).

⁹⁴*Berry v. Empire Indem. Ins. Co.*, 634 P.2d 718 (Okla. 1981); *Boyles v. Oklahoma Natural Gas Co.*, 619 P.2d 613 (Okla. 1980); *Laubach v. Morgan*, 588 P.2d 1071 (Okla. 1978).

⁹⁵Remarks of Mr. Bayliff, *supra* note 87.

⁹⁶See *infra* notes 99-108, 123-36 and accompanying text.

⁹⁷See *infra* notes 109-22, 138-47 and accompanying text.

sections three and four, affect only the plaintiff's right of *recovery of damages* and not the defendants' *liability*. As comparison with the legislative enactments of other states illustrates, the Indiana Act's substantive provisions invoke the comparative fault principle only by reducing the amount of, or barring, damages in proportion to the plaintiff's fault, whereas all of the other states' schemes specifically address the extent of the defendants' liability.⁹⁸ A close look at those statutes will show that the substantive declarations are stated in specific terms which tie the reduction of damages in multiple defendants cases directly to the defendants' liability.

The Kansas statute provides:

Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, *each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of his causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.*⁹⁹

Louisiana's statute provides:

He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, in solido, with that person, for the damage caused by such act.

Persons whose concurring fault has caused injury, death or loss to another are also answerable, in solido; provided, however, when the amount of recovery has been reduced in accordance with the preceding article, *a judgment debtor shall not be liable for more than the degree of his fault to a judgment creditor to whom a greater degree of negligence has been attributed, reserving to all parties their respective rights of indemnity and contribution.*¹⁰⁰

The New Hampshire provision states:

. . . provided that where recovery is allowed against more than one defendant, *each such defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed.*¹⁰¹

The Ohio Statute's language is:

⁹⁸See *infra* notes 99-101 and accompanying text.

⁹⁹KAN. STAT. ANN. § 60-258a(d) (Supp. 1984) (emphasis added).

¹⁰⁰LA. CIV. CODE ANN. art. 2324 (West Supp. 1984) (emphasis added).

¹⁰¹N.H. REV. STAT. ANN. § 507:7a (1983) (emphasis added). The Vermont statute uses language almost identical to the emphasized portion of the New Hampshire provisions

If recovery for damages determined to be directly and proximately caused by the negligence of more than one person is allowed under division (A)(1) of this section, *each person against whom recovery is allowed is liable* to the person bringing the action for a portion of the total damages allowed under that division. The portion of damages for which *each person is liable* is calculated by multiplying the total damages allowed by a fraction in which the numerator is the person's percentage of negligence, which percentage is determined pursuant to division (B) of this section, and the denominator is the total of the percentages of negligence, which percentages are determined pursuant to division (B) of this section to be attributable to all persons from whom recovery is allowed. Any percentage of negligence attributable to the person bringing the action shall not be included in the total of percentages of negligence that is the denominator in the fraction.¹⁰²

The greater specificity of these statutes over the Indiana Act is immediately apparent. States intending to affect the rule of joint and several liability have employed specific terms with direct substantive impact upon the liability of those subject to the common law rule, whereas the Indiana Act is completely silent on the matter. The Indiana Act operates only to diminish the plaintiff's compensation in proportion to his own contributory fault. Therefore, the abolition argument's essential "necessary implication" finds no support in the substantive portions of the Indiana Act. Instead, the intent to abrogate the common law must stand or fall upon the effect of the *suggested* jury instructions.¹⁰³

The Indiana Act's suggested jury instructions are not substantive provisions. They merely repeat the principles contained in sections three and four, and outline a procedure for implementing those principles. In effect, the instructions translate the substance of the Act for the jury's benefit. In fact, the translation reflects the same operation of the substantive provisions, directing the jury to reduce the plaintiff's compensation in proportion to his fault. Indeed, the instructions direct the jury to perform its computations by references to the defendants' "fault," but such directions should be viewed as merely an expedient way to perform rather complex calculations.¹⁰⁴ If the function of the suggested jury instructions is viewed simply as assuring ease in computations and

quoted above. VT. STAT. ANN. tit. 12, § 1036 (Supp. 1983). The statutes limiting joint and several liability to situations where the plaintiff's fault is less than the defendant's fault are similarly specific. See OR. REV. STAT. § 18.485 (1977); TEX. REV. CIV. STAT. art. 2212a (Vernon Supp. 1983).

¹⁰²OHIO REV. CODE ANN. § 2315.19(9)(2) (Page 1981) (emphasis added).

¹⁰³See *supra* notes 86, 90 and accompanying text.

¹⁰⁴It is easier, after all, for the jury to reduce the "unadjusted" damages figure by performing one multiplication function than it would be to first multiply the "unadjusted" damages figure by the plaintiff's percentage of "fault," then subtract the product of that

reducing occasion for error, the strength of an implied abolition of joint and several liability weakens.

(2) *Assumption of the requirement of seriatim verdicts and separate judgments.*—The abolition argument asserts that a plaintiff who seeks to collect more than a verdict amount against a joint tortfeasor exceeds the legal authority residing in him to execute on the judgment. The retention argument first counters by pointing out two assumptions underlying that assertion: (1) that the Act requires seriatim verdicts for each party-defendant and (2) that separate judgments would be entered on each verdict. Neither assumption is compelled by the language of the Act. Additionally, even if the Act were taken to compel such results, the validity of such requirements is open to serious challenge.¹⁰⁵

First, the language of the proposed instruction does not compel the rendition of seriatim verdicts. Indeed, one reading of the lead sentence to the proposed instructions for multiple defendant cases would compel but a single verdict against all defendants with separate parts relating to proportionate shares of damages for each defendant: "In an action based on fault that is brought against two (2) or more defendants, and that is tried to a jury, the court, unless all parties agree otherwise, shall instruct the jury to determine its *verdict* in the following manner"¹⁰⁶ The singular term "verdict" in the lead sentence denotes a single verdict covering the case against all defendants.

On the other hand, the fourth subdivision of the proposed instructions requires the jury to "enter a verdict against each such defendant."¹⁰⁷ The singular usage of "verdict" and the term "each" in the connecting phrase in this subdivision connotes a number of individual verdicts equal to the number of defendants. However, an equally valid construction of the phrase would be that each defendant, and her proportionate share of damages, shall be named in *a verdict*. The fourth subdivision's phrase is syntactically ambiguous, but this ambiguity can be resolved by reading the subdivision against the background of the lead sentence quoted above. The construction given the subdivision should be one that agrees with the lead sentence's use of the singular "verdict." If the legislature intended to compel seriatim verdicts, it easily could have used the plural "verdicts" in the lead sentence and clarified the fourth subdivision by inserting the term "separate" before the term "verdict."¹⁰⁸ In this light,

multiplication from the "unadjusted" damages figure and then enter the remainder as the verdict.

¹⁰⁵See *infra* notes 109-22, 138-47 and accompanying text.

¹⁰⁶IND. CODE § 34-4-33-5(b) (emphasis added).

¹⁰⁷*Id.* § 34-4-33-5(b)(4).

¹⁰⁸Section six of the Act also uses the singular "verdict," suggesting that the final verdict of the jury is to be expressed as a single damages figure, representing the sum of the figures derived for each defendant. Because the jury instructions are detailed, one might suppose the legislature would have required the expression of this "bottom line" figure—if it had thought about it.

the single verdict interpretation finds more support in the larger context of the Act's provisions than does the seriatim verdict interpretation.

Assuming *arguendo* that the Act requires seriatim verdicts, a conclusion that separate judgments should be entered for each separate verdict does not necessarily follow. In fact, some of the Indiana Rules of Trial Procedure strongly indicate a contrary conclusion. Rule 58, for example, requires that "upon a general verdict of a jury, or upon a decision announced, the court shall promptly prepare and sign the judgment, and the clerk shall thereupon enter it."¹⁰⁹ The Rule is expressly made "[s]ubject to the provisions of 54(B),"¹¹⁰ which in turn deals with judgments involving multiple claims or parties.¹¹¹ Rule 54(B) contemplates situations calling for the expedition of multiple claims or multiple party lawsuits. The rule permits separate judgments upon less than all of the claims of parties when the subjects of the judgments are severable from the claims or parties which have not reached the judgment stage.¹¹² It confers discretion upon the trial court to enter such separate judgments, but "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment"¹¹³ Separate judgments are clearly not mandated and the circumstances invoking the exercise of the rule's discretionary power are not suggested simply by the presentation of seriatim verdicts to the court in a comparative fault case. Rule 54(B) is designed to prevent delays with respect to severable matters in a multiple claim or multiple party case¹¹⁴ and the ordinary multiple

¹⁰⁹IND. R. TR. P. 58.

¹¹⁰*Id.*

¹¹¹*Id.* 54(B) reads:

(B) Judgment upon multiple claims or involving multiple parties. When more than one [1] claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. A judgment as to one or more but fewer than all of the claims or parties is final when the court in writing expressly determines that there is no just reason for delay, and in writing expressly directs entry of judgment, and an appeal may be taken by the judgment; but in other cases a judgment, decision or order as to less than all the claims and parties is not final.

Id.

¹¹²*Id.*

¹¹³*Id.*

¹¹⁴*See*, 10 C. WRIGHT, A. MILLER, M. KANE, FEDERAL PRACTICE AND PROCEDURE §

party case calls for a single judgment. Moreover, Rule 54(E) provides that judgments

against two [2] or more persons or upon two [2] or more claims shall be deemed joint and several for purposes of:

- (1) permitting enforcement proceedings jointly or separately against different parties or jointly or separately against their property; or
- (2) permitting one or more parties to challenge the judgment (by appeal, motion and the like) as against one or more parties as to one or more claims or parts of claims.¹¹⁵

It is the judgment, not the verdict, which creates the defendant's debt to the plaintiff and extinguishes the plaintiff's claim.¹¹⁶ If the analysis that seriatim verdicts rendered by the jury would comprise a single judgment is correct, then the plaintiff would execute on the judgment which encompasses the entire findings on damages, and the plaintiff would not necessarily be prohibited from seeking satisfaction of the entire judgment from a joint tortfeasor.

In addition, the verdict form prescribed by the Act is defined generally, and requires only "the disclosure of: (1) the percentage of fault charged against each party; and (2) the calculations made by the jury to arrive at their final verdict."¹¹⁷ It does not specify recitals linking specific damage figures to specific defendants. A verdict form similar to the example set out below¹¹⁸ would satisfy the Act's requirements, respond to the proposed instructions which assist the jury in making

2654 (1983) (discussing Federal Rule 54, after which the Indiana Rule is patterned). See also, 6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶54.04 (1983).

¹¹⁵IND. R. TR. P. 54(E).

¹¹⁶See RESTATEMENT (SECOND) OF JUDGMENTS §§ 18, 24 (1982).

¹¹⁷IND. CODE § 34-4-33-6.

¹¹⁸

VERDICT

We, the jury find:

1. that Plaintiff's percentage of fault equals _____%
 2. that Defendant One's percentage of fault equals _____%
 3. that Defendant Two's percentage of fault equals _____%
 4. that nonparty one's percentage of fault equals _____%
 5. that the total fault of all of the parties above equals _____%
 6. that Plaintiff's total amount of damages, disregarding contributory fault equals \$_____
 7. that Defendant One's _____% of fault × (times) Plaintiff's total damages in #6 equals \$_____
 8. that Defendant Two's _____% of fault × (times) Plaintiff's total damages in #6 equals \$_____
- Therefore, we the jury further find and enter our Verdict for Plaintiff against Defendant One and Defendant Two in the amount of (#7 + #8) \$_____

the computations, and resolve the issue of whether one or multiple judgments should be entered.

Of course, the argument for abolishing joint and several liability is not wholly dependent upon seriatim verdicts and separate judgments. If the verdict is not simply a general form such as, "the jury finds for Plaintiff *A* against Defendants *B* and *C* in the amount of *X* dollars," the defendant against whom plaintiff seeks full satisfaction may still argue against joint and several liability. The defendant against whom satisfaction of full damages is sought might argue that with respect to her, the judgment¹¹⁹ created a debt which is limited by the verdict relating to her. However, the plaintiff's counterassertions¹²⁰ have enlarged the issue, showing that the defendant's "practical effect" argument casts a longer shadow than the mere abrogation of a common law doctrine. The defendant's position must now sustain practical effects upon the Rules of Trial Procedure and the law of judgments. These effects are to be accomplished only by a "necessary implication."¹²¹ Furthermore, the "necessary implication" must rest upon the thin reed of legislatively suggested jury instructions.¹²² The defendant's "practical effects" argument thus begins to buckle under an onerous burden.

(3) *Effect of the Act's defendant definitions.*—Another argument in support of retention is based upon other segments of the Act which lack the specificity needed for an implied abolition of the doctrine. This argument contemplates the effects of the Act's distinction between two types of defendants. One type is simply "defendants," the second type is defendants who "may be treated along with another defendant as a single party."¹²³ A defendant who may be treated with another as a single party is one against whom "recovery is sought . . . not based upon his own alleged act or omission . . . but upon his relationship to the other defendant."¹²⁴ The first type of "defendant" is not defined in the Act, but the inference drawn from the definition of the other

¹¹⁹In addition to section six requirements, a verdict form may include this statement: "We find for Plaintiff *A* against Defendant *B* in the amount of *X* dollars," and a separate statement, "we find for Plaintiff *A* against Defendant *C* in the amount of *Y* dollars." Although the verdict involves separate and limited findings, it is not a special verdict requiring the court to reach conclusions based upon those findings, and absent Rule 54 circumstances, a court would enter a single judgment.

¹²⁰See *supra* notes 109-16 and accompanying text.

¹²¹See Remarks of Mr. Bayliff, *supra* note 87 and accompanying text.

¹²²The jury instructions, after all, may be modified upon the agreement of all the parties. While it may be farfetched to suppose that all joint tortfeasors would agree to jury instructions that remove the language which supports the abolition argument, those suggestions hardly represent concrete legislative commitment to the abrogation of common law doctrine and trial rules.

¹²³IND. CODE § 34-4-33-2(b).

¹²⁴*Id.*

class would be that they are all other defendants. In parallel language, these "defendants" are those against whom recovery is sought based upon their own alleged act or omission and not based upon their relationship to another defendant.¹²⁵ Joint tortfeasors clearly do not fall into the second class because they are being sued upon their own acts or omissions, but it is not entirely clear that true joint tortfeasors fit within the first classification.

The meaning of "joint tortfeasors" and, consequently, the meaning of "joint and several liability" has slipped into obscurity by virtue of loose usage and the impact of modern rules of joinder.¹²⁶ Eliminating that obscurity is beyond the scope of this Article, but some background may be enlightening. The root of "joint tortfeasorship" is suggested quite strongly by the term "joint"; the relationship of joint action between the multiple actors subjects them to liability for the plaintiff's entire injury. That relationship of joint conduct, plus the operation of the general principle that a wrongdoer should not escape liability merely by pointing an accusing finger at another wrongdoer,¹²⁷ formed the basis for imposing entire liability upon each actor. Under the rule, if multiple actors join in concert or conspiracy to inflict tortious injury, a plaintiff can seek to hold them accountable individually or as the injury-inflicting group.¹²⁸ Modern rules of procedure, which abrogate the common law restrictions upon joinder, have eroded the boundaries of the original concepts of joint and several liability. That erosion undoubtedly was hastened by occasional cases involving indivisible injury caused by multiple actors. Concurrent, independent conduct consequently is treated in modern parlance as if fitting the traditional concepts.¹²⁹ Still, the older principles are inherent in the substance of the tort doctrine, and those principles illuminate the characteristics of actions that carry the onus of entire liability for multiple actors. Although the true nature of a joint tortfeasor action is that multiple acts were related, interconnected, and jointly aimed at plaintiff's interests, modern notions of expediency and efficiency, under which the trial of all issues between all parties is permitted, have obscured that characteristic.

In view of this historic background, the Act's definitions of defendants may not include the *true* joint tortfeasor. Pursuing this view, the plaintiff would argue that he is not seeking recovery against multiple actors simply upon the basis of each actors' *own* acts or omissions,¹³⁰

¹²⁵The original Act defined "primary" defendant in this way. Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 2(a), 1983 Ind. Acts. 1930, 1931.

¹²⁶See generally 2 F. HARPER & F. JAMES, *supra* note 74, at § 20.3; W. PROSSER, *supra* note 74, at 291-92.

¹²⁷See *Kingston v. Chicago & N.W. Ry. Co.*, 191 Wis. 610, 211 N.W. 913 (1927).

¹²⁸See authorities cited *supra* note 126.

¹²⁹*Id.*

¹³⁰See *supra* note 124 and accompanying text.

but upon those acts or omissions as a whole concert or conspiracy of action. Plaintiff *is*, therefore, seeking to hold those actors responsible upon their relationship with each other. If this analysis is valid, then the Act has not addressed the true joint tortfeasor situation and should not be found to have incidentally and implicitly abolished the form of the remedy traditionally recognized in concert or conspiracy of action cases.

Furthermore, the same rationale may support a similar assertion in the context of concurrent tortfeasors. In this extension, the relationship element of the argument is probably a bit strained, but perhaps not to the breaking point in the case of an indivisible injury produced by technically-independent but factually-related injurious conduct such as the classic *Summers v. Tice* situation.¹³¹

In light of the dicta in *Summers v. Tice*¹³² and later authorities which extended the concurrent tortfeasor analysis to cases in which the defendants were not acting in true concert,¹³³ the principles of joint and several liability would perhaps be strained if *not* applied to a plaintiff's claim. When, for example, three hunters knowing of each other's presence, but not hunting as a team, converged upon their quarry from three directions and two of them negligently fired in the third's direction to inflict an indivisible injury, the lack of true concert of action seems of little consequence. Even without the cause-in-fact problem dealt with by the *Summers v. Tice* court, the acts of the independent tortfeasors are, in their most crucial aspect, related in their joint and inseparable invasion of plaintiff's bodily integrity. Only the nicest of legal distinctions would justify treating the cases differently and denying joint and several liability in the latter.¹³⁴ However, if defendants are not to be permitted to escape liability by pointing the accusing finger at other wrongdoers, the logic of the argument compels a plaintiff who is also at fault to bear entire liability for an impecunious concurrent tortfeasor. Comparative fault might permit such plaintiffs to escape accountability, but only, and properly so, at the cost of abandoning the "constructive" joint tort argument.

¹³¹33 Cal. 2d 80, 199 P.2d 1 (1948). In that case, two hunters had fired in the plaintiff's direction and the evidence could not establish which one had fired the injurious shot. The court, noting rather explicitly that the three parties were acting as a team, saw the case as an appropriate one to apply principles of joint and several liability. *Id.* at 84, 199 P.2d at 2-3. Moreover, the court expressed its belief that true concert of action was not an essential aspect of the case, and indicated that it would apply the principle even where the actors produced the injury independently. *Id.* at 88, 199 P.2d at 5.

¹³²*Id.*

¹³³See W. PROSSER, *supra* note 74, at 293-99 and authorities cited therein.

¹³⁴A parade of horrors is possible. Consider the case of the slightly negligent shooter and the grossly negligent shooter whose pellets in combination cause plaintiff to lose a limb. If the grossly negligent defendant is impecunious, the plaintiff should not be denied full recovery on the simple ground that a suggested jury instruction results in a low

An extension of logic carries similar risks for the plaintiff using the argument in a true joint tortfeasor case. Since the proposed jury instructions are keyed specifically to the definitions of the two classes of defendants, if plaintiff persuades the court that his case involves a third class of tortious actors, he and the court face a statutory void. If the court fills that void with the common law and proceeds in a pre-Comparative Fault Act manner, the plaintiff who has contributed negligently to his own injury will be totally barred from recovery. On the other hand, although the statute's proposed jury instructions do not carry the substance of the Act, they surely provide a clear outline of the mechanical principles for the court's guidance. A court may be persuaded to fill the void of precise statutory language with a set of jury instructions tailoring the apportionment principle to the joint tort case.¹³⁵

The plaintiff might also argue that the joint tortfeasors who are excluded by the two defined classes of defendants may be subject to a "pure comparison" of fault. This approach focuses on the language of section three, which merely sets out the general apportionment principle. That section does not refer to defendants, and thereby avoids the problem of an undefined "third" class of defendants. It could therefore be validly applied to joint tortfeasors. The plaintiff would assert that the "greater than 50% rule" of section four would not bar his action because it is keyed to the two classes of defendants. This interpretation, which brings two sections of the Act into conflict, must be viewed as contrary to the spirit of the Act. The argument may be advanced, however, as an "implication" of the Act no less technically "necessary" than the abolition argument.¹³⁶

In view of the possible pitfalls of the "third class" of defendants arguments, the plaintiff may prefer to argue simply that, although it is not clearly stated, the set of instructions pertaining to multiple defendants who may be treated as a single party is the applicable set. In its most legally significant effect the rule of joint and several liability has always treated joint tortfeasors as a single party. In their concert of action they have combined into a single invasionary force to bring about a harm to the plaintiff. The culpable acts of each as independent and separable elements become inconsequential to the liability each may be made to bear. The plaintiff would argue that the basis of liability of each defendant is not "his own alleged act or omission" in the sense of distinct individual conduct. Instead, the plaintiff would assert that the interdependency of the acts, related in concert, requires the defendants

percentage of "fault" for the other tortfeasor nor upon the ground that the slightly negligent defendant did not cause the entire injury.

¹³⁵See, e.g., the jury instructions at *supra* note 118.

¹³⁶This is another reason the drafters should have stated the main principle of the Act in a unified affirmative manner. See *supra* notes 56-67 and accompanying text.

to be treated as a single party. If this argument prevails, the jury would assess the "fault" of the defendants in the aggregate, and adjust the plaintiff's damages proportionately.¹³⁷

(4) *Legal and institutional validity of the required jury procedure.*—The plaintiff might assume *arguendo* the practical effect argument and shift his attack to concentrate upon the legal and institutional validity of the jury process required by the Act. This attack would focus upon the requirements of section six.¹³⁸ Because section six requires the recitation of special findings of fact (the percentages of fault and the calculations required by the instructions),¹³⁹ the Act effectively requires the jury to answer interrogatories. This requirement raises a troublesome issue of institutional conflict between the legislature and the courts concerning the respective powers of those two branches to determine rules of procedure. Rule 49 of the Indiana Rules of Trial Procedure declares simply: "Special verdicts and interrogatories to the jury are abolished."¹⁴⁰ If section six of the Act resurrects jury interrogatories for this class of legal proceedings, a trial judge will be placed in the quandary of whether to follow the Act's prescription or to heed Rule 49.

The Indiana Supreme Court has recognized the General Assembly's coordinate power in promulgating rules of procedure for the courts.¹⁴¹ The court need not obtain legislative approval of its rules, and legislative rules enacted in an area of judicial silence are to be treated as valid, if only to protect rights that would be denied in the procedural vacuum.¹⁴² The quandary, therefore, is not resolved by a simple proposition that one set of rules or the other always prevails.

Where the competing rules conflict, however, the court rules take precedence: "[A] procedural rule enacted by statute may not operate as an exception to one of [the court's] rules having general application. If such an exception is to be made, it lies within [the court's] exclusive province to make it."¹⁴³ Therefore, if section six and Rule 49 conflict,

¹³⁷For example, where the plaintiff's damages are \$10,000 and the plaintiff's fault is assessed at 20% and joint tortfeasors *A* and *B* have 30% and 50% fault respectively, the jury would return an aggregate verdict of \$8,000. Thus, *A* and *B* are treated as a single defendant under the first set of instructions. A modification of the suggested form at *supra* note 118 could be employed. The modification would include a finding that the defendants were, by virtue of their joint conduct, being treated as a single party.

¹³⁸IND. CODE § 34-4-33-6.

¹³⁹*Id.*

¹⁴⁰IND. R. TR. P. 49.

¹⁴¹*E.g.*, *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585 (Ind. 1980); *In re Pub. Law No. 305 and Pub. Law No. 309*, 263 Ind. 506, 334 N.E.2d 659 (1975); *Neeley v. State*, 261 Ind. 434, 305 N.E.2d 434 (1974); *State v. Bridenhager*, 257 Ind. 699, 279 N.E.2d 794 (1972); *Harris v. Young Women's Christian Ass'n*, 250 Ind. 491, 237 N.E.2d 242 (1968); *State ex. rel. Blood v. Gibson Circuit Court*, 239 Ind. 394, 157 N.E.2d 475 (1959).

¹⁴²*State v. Bridenhager*, 257 Ind. 699, 703, 279 N.E.2d 794, 796 (1972).

¹⁴³*Id.* at 704, 279 N.E.2d 796-97. *See also* *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585 (Ind. 1980); *Neeley v. State*, 261 Ind. 434, 305 N.E.2d 434 (1974).

the trial judge must pay heed to Rule 49.¹⁴⁴

However, both rules may be valid if they are not truly in conflict. If section six operates in an area of judicial silence, it is to be treated as valid until the Supreme Court abrogates it by promulgating its own rule.¹⁴⁵ If the legislature has merely filled a void left by Rule 49, the section should be able to withstand challenge. A direct positive-statement versus negative-statement conflict is not required, however, and the legislative rule must fall if it is "incompatible to the extent that both could not apply to a given situation."¹⁴⁶ In the situation at hand, this "incompatibility test" seems easily satisfied. First, Rule 49 is not simply a void to be filled by the legislative rule as might have been the case if the number of the Rule had simply been left vacant. The Rule affirmatively abolishes jury interrogatories, and a trial judge could not both allow and disallow the recitals required by section six. Second, the recitals required by the section are, in effect, legislatively enacted exceptions to Rule 49, exceptions which arise only in "actions based on fault." The suggested jury instructions must, therefore, fall as a legislative incursion upon the "exclusive province" of the court.¹⁴⁷

Even if all of the arguments for retaining joint and several liability with the current Act's language are considered unpersuasive, the General Assembly should revise the Act. The attempted balance disproportionately benefits tortfeasors. If joint and several liability is abolished, multiple tortfeasors are assured that the evenhandedness of pure apportionment will prevent them from bearing more than their assessed proportion of "fault," while a plaintiff is denied pure apportionment by the 50% rule. A plaintiff who is 51% at "fault" must bear 100% of the cost of the injury, while a defendant who is 51% at "fault" bears only 51% of the liability. The defendant's 51% may have been instigating the jointly negligent (or willful, wanton, or reckless) concert of action with a judgment-proof cohort.

An even greater inequity exists where the plaintiff is "fault"-free and must bear the cost of the injury equal to the impecunious defendant's "fault." The "evenhandedness" of this system of apportionment works to the benefit of tortfeasors and to the detriment of injured plaintiffs.

Where possible, plaintiffs should be required to pursue judgment against each person fairly chargeable with accountability for the injury.

¹⁴⁴State v. Bridenhager, 257 Ind. 699, 279 N.E.2d 794 (1972).

¹⁴⁵*Id.*

¹⁴⁶*Id.* at 704, 279 N.E.2d at 796.

¹⁴⁷*Id.* There is a similar conflict with Trial Rule 54(D) if the practical effect of the jury instructions is to require the entry of judgments that are only several and not joint. Even if section six were construed as void and severable from the Act to avoid invalidating conflict with Rule 49, section five's separate recitals of proportions of fault and related individual verdicts are still vulnerable to challenge by the foregoing arguments.

However, defendants who would otherwise be jointly liable for the injuries should not be able to cast the entire effect of the fortuitous presence of an impecunious tortfeasor upon the plaintiff, especially if the plaintiff is entirely free from fault.¹⁴⁸ Plaintiffs who are not at fault do not share the same interest in a comparative fault system as those who have contributed to their own injuries. Innocent injured claimants clearly are not elements of the “greater good for the greater number” legislative compromise formula, and should not be asked to give up the common law doctrine’s protections.

Adoption of comparative fault signals the embrace of a policy of refining the compensation function of tort law in order that injured parties’ needs may be more widely and accurately served. Abolition of joint and several liability operates against that policy. At the same time, the fairness element inherent in the comparative fault system powerfully favors the interests of tortfeasors who rightfully claim that liability apportioned to fault is meaningless if they are made to bear more than their assessed percentage of fault. The answer to these competing interests lies neither in a simplistic abandonment of joint and several liability nor in a simplistic retention of the old common law doctrine and its allied rules. Plaintiffs’ and defendants’ interests can both be addressed if joint and several liability is retained *in connection* with the adoption of two additional refinements of the compensation function. The first, equitable reapportionment, addresses the problem of the judgment-proof tortfeasor and requires all parties at fault to share the burden of the impaired compensation that such defendants impose.¹⁴⁹ The second, a rule permitting apportioned contribution among tortfeasors, addresses the problem of malapportionment in the event the plaintiff elects to pursue execution of the entire judgment against a single joint tortfeasor.¹⁵⁰

(5) *Equitable reapportionment as a substitute for joint and several liability.*—In cases in which the plaintiff is at fault, he should bear part of the burden of the judgment-proof defendant’s fault by an equitable reapportionment of accountability.¹⁵¹ Equitable reapportionment allows

¹⁴⁸Care must be taken to maintain the distinction between actions which involve a valid case for joint and several liability, a true concert of action case, and actions in which joinder of multiple but independent concurrent or consecutive tortfeasors has been made for the sake of judicial efficiency. Absent a proper case for the application of joint and entire liability upon a set of tortfeasors, the injured plaintiff has no claim to be made better off by the application of the doctrine. It is simply because some courts and attorneys have blurred the distinction and have applied joint and several liability as a matter of convenience that the defense bar has a basis for arguing against the plaintiff’s “empty chair” strategy. See *infra* notes 200-34 and accompanying text.

¹⁴⁹See *infra* notes 151-53 and accompanying text.

¹⁵⁰See *infra* notes 154-62 and accompanying text.

¹⁵¹This reapportionment is easily administered, although it may appear facially complex. For example, if Plaintiff *P*, and defendants *A* and *B* were cutting down a tree which fell on *P* because of all three’s negligence, neither *A* nor *P* should be singled out to bear

the plaintiffs to receive an amount closer to full compensation, while the defendant's liability is not only apportioned to fault but also accounts for the relationship of the defendant to her impecunious partner in tort. The concert of action is addressed without requiring the solvent defendant to pay the full amount that the rule of joint and several liability would require.¹⁵² Such reapportionment was recommended by the National Conference of Commissioners on Uniform State Laws,¹⁵³ and is an equitable approach. The Indiana Act is not equitable, and should be amended to include the Uniform Act's proposal.

F. Section 7: Contribution and Indemnity

1. *Contribution.*—Section seven of the Act bans contribution between tortfeasors.¹⁵⁴ Why the Indiana legislature considered it necessary to include the ban is open to question, given the Act's purported abolition of joint and several liability,¹⁵⁵ and the fact that contribution is presently unavailable at common law in Indiana.¹⁵⁶ Whatever the reason, the ban

the entire cost of *B*'s acts if *B* is impecunious. Equitable reapportionment requires both *P* and *A* to bear a fair share of *B*'s fault. If *P*'s injuries were assessed at \$10,000, and *P*'s, *A*'s and *B*'s "fault" at 33-1/3% each, 6/9 of the fault which produced the injury is attributable to *P* and *A*. *B*'s "fault," if equitably redistributed to *P* and *A*, would add 3/18 to each of their shares of accountability. *A*'s liability to *P* should, therefore, be for 50% (9/18) of \$10,000.

¹⁵²In the case of a nonculpable plaintiff, the principle produces the same result as the common law.

¹⁵³UNIFORM ACT, *supra* note 7, § 2(c)(d) at 39.

¹⁵⁴IND. CODE § 34-4-33-7 (Supp. 1984).

¹⁵⁵*See supra* text accompanying notes 90-94.

¹⁵⁶The proposition of no contribution among joint tortfeasors was enunciated by the Indiana Supreme Court at a very early date in the state's history. The first case appears to be *Hunt v. Lane*, 9 Ind. 248 (1857), in which the court cited to Chitty on Contracts, but to no earlier case. The proposition is so well-settled that the issue has rarely arisen in litigation since. *See Jackson v. Record*, 211 Ind. 141, 5 N.E.2d 897 (1937) (dictum); *Silvers v. Nerdlinger*, 30 Ind. 53, 60 (1868); *Barker v. Cole*, 396 N.E.2d 964 (Ind. Ct. App. 1979). The rule, plus the position of Indiana courts that a release of one joint tortfeasor is a release of all, has produced a practice of "loan receipt agreements," in which one defendant or her insurance carrier will advance the plaintiff a sum of money in return for a "covenant not to execute" by the plaintiff. The agreements essentially provide for full or partial discharge of the loan in the event the plaintiff is unsuccessful against the other tortfeasors, and for full or partial repayment of the loan from the funds obtained in satisfaction of any judgment obtained against other tortfeasors. Thus, the device serves both the function of providing an injured party with needed funds with which to meet the additional financial needs produced by the injury, and the function of limiting the lending defendant's exposure to liability for plaintiff's full damages. The Indiana Court of Appeals has even approved such agreements executed *after* judgment. *Barker v. Cole*, 396 N.E.2d 964 (Ind. Ct. App. 1979). However, that result was reached over a vigorous dissent by Judge Staton arguing that such approval sanctions "a vehicle whereby one economic inequity is cured by the creation of another," because the ability to avoid full liability is dependent upon the financial liquidity of the settling defendant and places the burden of the entire judgment upon the defendant lacking that liquidity. *Id.* at 973 (Staton, J., dissenting).

reflects the legislature's ambivalence toward the apportionment principle, and stands as an unfortunate foreclosure of judicial use of contribution to adjust and refine the comparative fault system in the state. If the equitable reapportionment system suggested in the previous discussion is adopted,¹⁵⁷ for example, it could not be fully effective without an amendment of the Act expressly permitting contribution.¹⁵⁸ Defendants made to bear a portion of the liability of insolvent or immune defendants should be afforded the opportunity to recoup their additional outlays, and should be enlisted in the effort to locate persons who might otherwise avoid accountability.

If the Act is ultimately construed to have no effect upon joint and several liability, the proscription of contribution presents a serious impediment to full utilization of the principles underpinning comparative

If the Act is interpreted as having abolished joint and several liability, it will curtail the use of "loan receipt agreements" in their present form. Since separate verdicts for each defendant will be rendered, the plaintiff no longer will have the opportunity to execute against nonsettling parties for the full amount of damages from which repayment of the loan can be made. Plaintiffs will not be able to repay the loan from judgment proceeds without diminution of their ultimate compensation. For example, assume that the plaintiff's damages were agreed to be \$100,000 and the settling defendant advanced the plaintiff \$20,000 as a loan on the condition that the plaintiff repay the loan from proceeds of execution on the judgment against the other defendants. If the jury's assessments matched the parties' estimates and the settling defendant was found 20% at "fault," the plaintiff would be obligated to repay the \$20,000 from the amount recovered from the other defendants. Assuming he was able to collect the remaining \$80,000 from those defendants, the plaintiff's net recovery after repayment would be \$60,000. Knowing that exposure to liability will be something less than the plaintiff's full damages, the settling defendant can exert the leverage of financial need to hold down the negotiated estimate of fault. If the jury's assessment of "fault" for the settling party exceeds the negotiated percentage, the plaintiff's net recovery will be reduced even more. Plaintiffs thus have little incentive to entertain "loan receipt" proposals except as a relatively quick source of funds. Whether that prospect would be sufficient to induce a plaintiff to enter such an agreement would depend upon individual financial circumstances, but the plaintiff's counsel should fully advise clients of the ultimate cost of the "up front" money.

Plaintiffs' counsel should explore the feasibility of including terms in the agreement which limit repayment solely to amounts recovered in excess of the agreed-upon estimate of total damages. For example, if the plaintiff and the settling defendant agreed that the plaintiff's total damages were \$100,000 and that the settling defendant's share of "fault" was 20%, the plaintiff might agree to repay a portion of the "loan" in the amount equal to the excess recovered if the plaintiff receives verdicts aggregating more than \$80,000 against nonsettling defendants.

¹⁵⁷See *supra* notes 151-53 and accompanying text.

¹⁵⁸Pro rata contribution, based upon proportionate shares of fault, is contemplated by equitable reapportionment. Per capita contribution, or equal shares, is the only rational method of division in a straight negligence system and has been outmoded by the development of comparative fault. The legislature may have contemplated per capita contribution in the ban and intended to foreclose the adoption of that method of contribution, since per capita contribution is incompatible with apportionment based upon percentages of "fault."

fault. If a plaintiff is able to obtain satisfaction of the entire judgment against a single defendant and that defendant is prevented from seeking contribution from other tortfeasors, apportionment of the defendants' fault will have been a meaningless exercise. Joint and several liability can be an important doctrinal tool in a system designed to expand the compensation function of tort law to afford relief to injured people previously denied protection.¹⁵⁹ Codification of the rule against contribution, however, has shackled the judicial hand to another outmoded principle. If the courts are persuaded that joint and several liability should survive under the Act's language, section seven prevents them from allowing those jointly liable defendants who have paid full satisfaction to plaintiffs to benefit from the fairness of the apportionment principle. If Indiana's Comparative Fault Act, a legislative reform based upon rejection of the gross one-sidedness of contributory negligence, prevents judicial attempts to avoid gross one-sided effects upon some tortfeasors by foreclosing implementation of the apportionment principle through contribution, the Act cannot seriously be termed a comprehensive reform of tort liability in this state.

Faced with the perplexity of trying to operate in a comparative fault system with an obsolete concept of contribution frozen in legislative language, a court might find persuasive the logic that as long as the ban on contribution stays, joint and several liability ought to go to maintain balance. That logic labors under the same problem as the "greater good for the greater number" argument for abolishing joint and several liability.¹⁶⁰ It may have superficial appeal, but close examination shows that the balance swings too far. When joint and several liability is abolished, the rule against contribution is redundant; no detriment is imposed against defendants' interests which needs to be counterbalanced. All of the detrimental effects are borne on the plaintiffs' side of the bar. A rule against contribution is antithetical to the apportionment principle.¹⁶¹ To conclude that the compensation function of tort law should be contracted for some injured people by abolishing joint and several liability because an outmoded relic of the common law negligence system which managed to slip into the Act would be a detriment to some wrongdoers is not only bad logic, it is also bad policy. The legislature should repeal the ban on contribution and replace

¹⁵⁹See *supra* notes 146-48 and accompanying text. The Uniform Act, upon which the Indiana Act is so heavily based, retains joint and several liability. That fact alone, in view of the long and careful consideration that the Commissioners on Uniform State Laws have given to a system of comparative fault, is a powerful argument for the retention of the doctrine. See UNIFORM ACT, *supra* note 7, § 2(c), at 39.

¹⁶⁰See *supra* text accompanying notes 90-91.

¹⁶¹See Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 159 (1932).

it with an equitable system of contribution such as that proposed by the Uniform Act.¹⁶²

In the interim, courts persuaded that the ban on contribution flaws the Act in principle and function may use a creative judicial approach

¹⁶²The Uniform Comparative Fault Act's provisions permit contribution limited by each tortfeasor's "equitable share of the obligation." UNIFORM ACT, *supra* note 7, § 4(a), at 42. A settling tortfeasor may seek contribution "only (1) if the liability by the person against whom contribution is sought has been extinguished and (2) to the extent that the amount paid in settlement was reasonable." *Id.* § 4(b). If a party has paid "more than his equitable share of the obligation, upon motion [he] may recover judgment for contribution." *Id.* § 5(a). The judge determines the equitable share of each party and states it in the judgment. *Id.* § 2(c). In addition, the judge reduces the claim of the releasing party by the amount of the equitable share of the released party. *Id.* § 6. "Equitable share" conforms to the percentage of fault assessed against the party by the trier of fact. *Id.* The Commissioners provide an illustration for the system:

Illustration No. 11. (Effect of release).

A was injured through the concurrent negligence of B, C and D. His damages are \$20,000. A settles with B for \$2,000.

The trial produces the following results:

A, 40% at fault (equitable share, \$8,000)

B, 30% at fault (equitable share, \$6,000)

C, 20% at fault (equitable share, \$4,000)

D, 10% at fault (equitable share, \$2,000)

A's claim is reduced by B's equitable share (\$6,000). He is awarded a judgment against C and D, making them jointly and severally liable for \$6,000. Their equitable shares of the obligation are \$4,000 and \$2,000 respectively.

Id. at 45. The Commissioners acknowledge that some discouragement of settlement is produced by this arrangement; they chose between alternative systems by giving primacy to the apportionment principle. *Id.* at 44.

In effect, the Indiana Act adopts part of the Uniform Act's position. Since the trier of fact will be required under most circumstances to assess a nonparty's "fault" and factor that assessment into "total fault" for the purposes of apportionment, the plaintiff's net recovery will be reduced by the percentage of "fault" attributable to the (settling) nonparty. The separate sums-certain verdicts against tortfeasors who are parties to the lawsuit arguably ensure that they do not pay more than their equitable share of liability. However, without a right of contribution, the settling tortfeasor has no way to recoup amounts paid in excess of the equitable share of liability and is immune from contribution from other tortfeasors if the settlement is for less than that share. Tortfeasors thereby have an incentive to keep negotiated percentages of fault low. On the other hand, if the plaintiff underestimates the settling defendant's fault, the amount of underestimation must be absorbed by the plaintiff in the form of a reduced verdict. The Indiana Act exceeds the Uniform Act's "tendency to discourage" settlements. If each party approaching settlement were to have some assurance that their settlement estimates would not ultimately penalize them, then the usual economic incentives to avoid litigation would be free to operate.

To accomplish that objective, one system would first reduce plaintiff's claim by the amount received in settlement. That might produce a slight disincentive on the plaintiff's part to settle, but since the plaintiff would be assured of receiving full damages, he would incur no penalty. This disincentive also might be overcome by the fact that the "up front" settlement funds would save trial expenses. Next, the defendants remaining in litigation would receive verdicts against them for the *remainder* in proportion to their

respective percentages of "fault." This would assure that the plaintiff received full compensation, but no more. Then, the party or parties who had paid more than their equitable share of damages would be entitled to contribution from those who had paid less. In the situation of a nonculpable plaintiff, the onus would fall upon the wrongdoers in the case to obtain the equitable adjustment and, contrary to the Uniform Act proposal, the innocent injured party would not be permitted to receive less than full compensation. Culpable plaintiffs would also benefit, but since the total damages would also have been reduced by the plaintiff's contribution of "fault," there would be no danger of overcompensation. The settling defendant would have an incentive to keep negotiation estimates of fault low in order to avoid the necessity of seeking contribution, but the incentive to avoid *under*-estimation and consequent contribution to other defendants would be at least as strong. In addition, settling defendants would have the assurance that errors in estimates of "fault" would not be final. Illustrations of the method follow:

Case A:

P injured by *D*, *E*, and *F*.

P's damages = \$100,000

P settles with *D* for \$20,000

Jury finds percentage of fault to be:

P, 0%

D, 10%

E, 30%

F, 60%

P's claim would be reduced by the amount received from *D* (\$100,000 - \$20,000 = \$80,000).

E's verdict reflects her liability for the proportionate share of the \$80,000 remainder ($3/9$ of \$80,000 = \$26,666.66).

F's verdict reflects her liability for the proportionate share of the \$80,000 = \$53,333.34). Since *D* paid twice her equitable share of liability, she would be entitled to contribution from *E* and *F* to the extent of their equitable shares. *D* would then be entitled to \$3,333.33 from *E* and \$6,666.67 from *F*.

Case B:

If all the facts were the same except that *E* settled with *P* for \$20,000.

D's verdict would be for \$11,428.58 ($1/7$ of \$80,000). *F*'s verdict would

be for \$68,571.42 ($6/7$ of \$80,000). *D* would be entitled to \$1,428.58

and *F* would be entitled to \$8,571.42 contribution from *E*.

Compare American Motorcycle Ass'n v. Superior Court of Los Angeles County, 20 Cal. 3d 578, 605-08, 578 P.2d 899, 916-18, 146 Cal. Rptr. 182, 199-201 (1978) (permits a tortfeasor to obtain "partial indemnity" from other nonsettling tortfeasors on a "comparative fault basis" after plaintiff's claim is reduced by the amount of settlement), *with* Pierringer v. Hager, 21 Wis. 2d 182, 191-92, 124 N.W.2d 106, 111-12 (1963) (allows a released tortfeasor to avoid contribution to nonsettling tortfeasors and requires plaintiff's claim to be reduced by the amount of the nonsettling defendant's percentage of fault). *See also* Kennedy v. City of Sawyer, 228 Kan. 439, 461-62, 618 P.2d 788, 803-04 (1980) ("If the reasonable amount of the damages is determined to be more than the settlement figure, all tortfeasors will receive the benefit of the bargain struck by the settling tortfeasors"; a settling tortfeasor having paid plaintiff's full claim will be entitled to "seek apportionment from his cotortfeasors based on comparative degrees of responsibility." *Kennedy*, 228 Kan. at 461-62, 618 P.2d at 803, 804.

The Indiana Act is too roughly hewn on the issues of contribution and joint liability. Settlements may well occur because the economics of settlement will supply strong arguments in any case. However, those settlements will not have occurred because the Act promoted them. The Indiana General Assembly should amend these provisions soon to permit the

permitting partial indemnification among joint tortfeasors.¹⁶³ This approach is technically simple, but since it requires the modification of a common law rule, judicial approval may prove exceedingly difficult to obtain.

2. *Indemnity*.—Section seven of the Act, after banning contribution among tortfeasors, declares that rights of indemnity are not affected.¹⁶⁴ Indemnity, like contribution, operates in the tort system as a legal means of obtaining reimbursement for monies paid to an injured person. The traditional common law concept of indemnity is an “all or nothing” proposition. Either the indemnitee is entitled to be reimbursed for the whole of the judgment paid by the indemnitor, or no entitlement exists at all.¹⁶⁵ The parties do not share accountability as in contribution; the indemnitor is required to make the indemnitee whole on the basis of restitution.¹⁶⁶

Rights of indemnity arise in a variety of situations. Full treatment of the doctrine and the circumstances to which it applies is beyond the scope of this discussion, but a general idea of the occasions which give rise to rights of indemnity can be obtained from descriptions contained in the Restatement (Second) of Torts, § 886B:

- (1) If two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability.
- (2) Instances in which indemnity is granted under this principle include the following:
 - (a) The indemnitee was liable only vicariously for the conduct of the indemnitor;
 - (b) The indemnitee acted pursuant to directions of the indemnitor and reasonably believed the directions to be lawful;
 - (c) The indemnitee was induced to act by a misrepresentation on the part of the indemnitor, upon which he justifiably relied;
 - (d) The indemnitor supplied a defective chattel or performed defective work upon land or buildings as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to

Act to operate more in keeping with the apportionment principle and to permit parties more flexibility in shaping nonlitigation alternatives to resolving their disputes.

¹⁶³See *infra* notes 183-88 and accompanying text.

¹⁶⁴IND. CODE § 34-4-33-7.

¹⁶⁵1 F. HARPER & F. JAMES, *supra* note 74, § 10.2, at 723; W. PROSSER, *supra* note 74, § 51, at 310; RESTATEMENT (SECOND) OF TORTS § 886B (1979).

¹⁶⁶RESTATEMENT (SECOND) OF TORTS, *supra* note 165, § 886B comment c.

- discover the defect;
- (e) The indemnitor created a dangerous condition of land or chattels as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect;
 - (f) The indemnitor was under a duty to the indemnitee to protect him against the liability to the third person.¹⁶⁷

The first three categories involve situations in which the indemnitee is not actually at fault but has been made accountable to a third person on the basis of some relationship with the indemnitor. The last three categories address circumstances in which the indemnitee may or may not have been at fault.

In contrast, Indiana case law recognizes the right of indemnification in only the first three categories. It has long been the view of Indiana courts that the right of indemnity does not arise if the person seeking indemnity may be considered a joint tortfeasor.¹⁶⁸ Only where the indemnitee has been held liable upon a theory of "derivative" or "constructive" fault does the right arise.¹⁶⁹ Absent a contractual obligation to indemnify, the only situation in which a right of indemnification exists in Indiana is when liability has been imposed against the indemnitee because of her vicarious liability for the acts of the indemnitor. The Indiana Act has contemplated defendants in the Restatement's first three categories. Section two of the Act refers to a "defendant [who] may be treated along with another defendant as a single party where recovery is sought against that defendant not based upon his own alleged act or omission but upon his relationship to the other defendant."¹⁷⁰ For example, if *A*, who was the employee of *B*, injured the plaintiff, *B* will be "treated along with . . . [*A*] as a single party."¹⁷¹ The assessment of "fault" against *A* will apply to *B* pursuant to the jury instructions of section five of the Act.¹⁷² Any payment made by *B* in satisfaction of the judgment may be the subject of an action for indemnity by *B*

¹⁶⁷*Id.* at 344-45.

¹⁶⁸*See, e.g.,* Westfield Gas & Milling Co. v. Noblesville & Eagletown Gravel Road Co., 13 Ind. App. 481, 482, 41 N.E. 955, 956 (1895) (dictum).

¹⁶⁹*See* Indiana State Highway Comm'n v. Thomas, 169 Ind. App. 13, 24, 346 N.E.2d 252, 259 (1976) (citing *McLish v. Niagra Machine & Tool Works*, 266 F. Supp. 987, 991 (S.D. Ind. 1967)). The *McLish* court cited *Silvers v. Nerdlinger*, 30 Ind. 53 (1868) and *City of Gary v. Bontrager Construction Co.*, 113 Ind. App. 151, 47 N.E.2d 182 (1943). *See also* Bituminous Casualty Corp. v. Hedinger, 407 F.2d 655 (7th Cir. 1969); *Augustine v. First Fed. Sav. & Loan Ass'n of Gary*, 175 Ind. App. 597, 603, 373 N.E.2d 181, 184 (1978) (Garrard, J., concurring and dissenting in part); *cf. Bash v. Young*, 2 Ind. App. 297, 28 N.E. 344 (1891) (good faith purchaser allowed indemnity against seller for owner's judgment).

¹⁷⁰IND. CODE § 34-4-33-2(b).

¹⁷¹*Id.*

¹⁷²*Id.* § 34-4-33-5(a).

against *A* on the restitution principle.¹⁷³ The Indiana Act has no effect on *B*'s rights against *A*.

If *A* and *B* are multiple defendants instead of parties who may be treated as a single defendant, a different result occurs. Consider an example based upon the Restatement's category (2)(e):¹⁷⁴ assume that *A* was constructing a power line through *B*'s premises and the plaintiff, *B*'s invitee, was injured when he came in contact with the line as he entered *B*'s property. The plaintiff sued *A* and *B*, citing *A*'s negligent construction and *B*'s negligent failure to discover and correct the hazard. If the Restatement view is followed, *B*, who was "passively negligent," would have a right of indemnification against *A*, the "actively negligent" tortfeasor. Defendant *B* would be able to recover any payment she made to the plaintiff in satisfaction of the judgment against her.¹⁷⁵ Under the Indiana Act and applicable common law, the jury would be instructed to assess the proportionate fault of *A* and *B* and render a verdict against each based upon portions of "fault," and *B* would have no right of indemnification against *A* for any monies she paid to the plaintiff in satisfaction of the judgment against her.¹⁷⁶

Thus, preservation of indemnification is consistent with the Act's two classes of defendants. Defendants' rights of indemnification are neither enlarged nor contracted by the Act. The common law of indemnity in Indiana therefore promises no assistance to joint tortfeasors who have paid more than their share of liability. If the doctrine of joint and several liability is found to have been unaffected by the Comparative Fault Act and if a plaintiff executed judgment against a single tortfeasor, comparative fault would be an empty phrase for that tortfeasor. In this class of cases, little actual refinement of the compensation function of tort law would have been accomplished. The new system of liability will simply allow some claims that plaintiffs' fault previously would have barred.

¹⁷³See *Indiana Nitroglycerine & Torpedo Co. v. Lippincott Glass Co.*, 165 Ind. 361, 75 N.E. 649 (1905).

¹⁷⁴RESTATEMENT (SECOND) OF TORTS, *supra* note 165, § 886B(2)(e).

¹⁷⁵Circumstances like the hypothetical will more than likely produce an occasion for applying principles of joint and several liability. Even in situations where the defendants are not acting in concert, a single, indivisible injury will give occasion to treat the two tortfeasors as jointly and severally liable in many jurisdictions. The point being raised in this discussion is not dependent upon an assumption that one of the tortfeasors has been required to pay the entire judgment, although that will probably have been the result. So long as *B* satisfies the criteria for indemnification under the Restatement's category (2)(e), she would be entitled to reimbursement for the total amount she paid in satisfaction of the plaintiff's judgment *against her*, regardless of whether that amount represented the plaintiff's total injury or a portion attributable to *B*'s negligence.

¹⁷⁶The conclusions stated here follow from the Act and the common law regardless of the ultimate position adopted by the courts on the issue of the Act's effect upon joint and several liability.

If Indiana courts believe that the balance struck should not simply be in plaintiffs' favor, but should also take into account defendants' interests, and if the courts reason that the law of indemnity can serve as a vehicle for fully implementing the comparative fault system, some features of the common law of indemnity will have to change. First, the right to be indemnified will have to be extended to joint tortfeasors. Second, since the Act's explicit ban upon contribution forecloses further common law development of that principle for the benefit of defendants in Indiana, the indemnity doctrine's "all-or-nothing" operation will have to be abandoned in favor of a rule permitting restitution which amounts to partial indemnification. Finally, measurement of the amount of restitution will have to be made on the basis of the apportionment of fault. These are significant changes, and a court would understandably be reluctant to depart from the simpler and more easily administered common law rule. Courts should overcome that reluctance and adopt a rule of partial equitable indemnification.

The proposition that joint tortfeasors are not entitled to indemnity amounts to a rule in search of a rationale in Indiana jurisprudence. The case most often cited for the proposition, *Silvers v. Nerdlinger*,¹⁷⁷ offers only the suggestion that wrongdoers *in pari delicto* are not entitled to the remedy. If that is indeed the rationale, it has been removed by the adoption of apportionment of fault. Under the prior negligence system, no occasion was presented for determining the respective quantities of fault of multiple tortfeasors. Having been found jointly negligent, each defendant was liable to the plaintiff for the entire amount on that basis alone. The plaintiff alone decided whether to seek satisfaction of the entire judgment or only a portion from a single defendant. In the eyes of the law, the defendants were equally at fault, and if one defendant claimed to have paid more than her fair share of the judgment, no basis existed for determining how much one defendant should reimburse the other.

Support for this view is found in the other leading case in the state, *City of Gary v. Bontrager Construction Co.*¹⁷⁸ In that case, the city argued that its right to recoup from a contractor who created a hazard, any damages it may have to pay to a person injured on city streets, should prevent the injured person from recovering from the city in the first instance. The court, while acknowledging the validity of the general proposition that a city could under certain circumstances recoup damages paid for the wrongdoing of a third party contractor, rejected the city's argument.¹⁷⁹ The basis for the rejection was that cities permitted indemnification in earlier cases had not been at fault. In the instant case,

¹⁷⁷30 Ind. 53 (1868).

¹⁷⁸113 Ind. App. 151, 47 N.E.2d 182 (1943).

¹⁷⁹*Id.* at 160, 47 N.E.2d at 186.

evidence of the city's independent negligence existed, and the city's claim for ultimate recoupment therefore had no foundation.¹⁸⁰ In light of the *Bontrager Construction* court's analysis, it is apparent that where a basis for comparing the fault of the tortfeasors is presented, that is, where negligence on the part of one tortfeasor and mere *vicarious* liability on the other's part is present, indemnification is available. Where both are at fault, the proposition of *in pari delicto* denies the remedy.

Comparative fault supplies the needed foundation for recognizing a right of indemnification of one tortfeasor by another. The old, rough-hewn determination of the mere presence or absence of negligence has been replaced by the apportionment principle. Even in joint tort situations, the jury's findings attribute specific proportions of fault to the actors. The presumptive *in pari delicto* concept is removed from the process, and in its place are concrete judgments about the relative culpability of defendants. A rational basis is supplied for deciding whether one tortfeasor should recover against another for payments made in excess of that culpability.¹⁸¹

Another rationale supporting the rule against joint tort indemnification is that the law will not stand in aid of a wrongdoer,¹⁸² although that rationale has not been articulated in Indiana case law. If that proposition ever had any validity in the context of indemnity,¹⁸³ the very essence of the comparative fault system militates against its continued use. Wrongdoing on the part of both plaintiffs and defendants is acknowledged, evaluated, and apportioned so that interests on both sides of the case may be served. The Indiana courts have adequate reason under the Comparative Fault Act to depart from the obsolete *Nerdlinger* view of indemnification.

By the same token, adoption of comparative fault opens the way for abandonment of the "all-or-nothing" operation of indemnity. Partial indemnification made no sense in the old system of liability where joint tortfeasors had no basis for claiming reimbursement in any amount less than the total sum they paid in satisfaction of the judgment debt. The common law doctrine of contribution, if available at all, was the closest the courts could come, and the apportionment provided by that doctrine

¹⁸⁰*Id.* at 161-63, 47 N.E.2d at 186-87.

¹⁸¹Further support for this view can be found in those jurisdictions which permit indemnification of a "passively" negligent tortfeasor by an "actively" negligent one. That approach demonstrates that where courts are able to discern a difference in the character or quality of the actors' fault, a right to indemnification follows. The Indiana courts have rejected this approach however. *Coca-Cola Bottling Co.-Goshen v. Vendo Co.*, 455 N.E.2d 370 (Ind. Ct. App. 1983); *Indiana State Highway Comm'n v. Thomas*, 169 Ind. App. 13, 346 N.E.2d 252 (1976). See *McLish v. Niagra Machine & Tool Works*, 266 F. Supp. 987, 991 (S.D. Ind. 1967) (citing *Indiana Harbor Belt R. Co. v. Jones*, 220 Ind. 139, 41 N.E.2d 361 (1942)).

¹⁸²See W. PROSSER, *supra* note 74, § 51, at 311.

¹⁸³*Id.*

was rational in a case of joint and several liability only upon an equal division, or *per capita* basis.¹⁸⁴ Apportionment of fault, a determination the Indiana Act requires in every case, supplies the needed logical support for restitution of a sum certain reflecting the indemnitor's portion of the damages paid to the injured plaintiff.

The sum certain can be determined by applying the percentages of "fault" assessed against the defendants in the trial of the case. For example, assume the plaintiff's damages are found to be \$100,000, and the "fault" of the parties is assessed in the following percentages: plaintiff - 20%; defendant one (D^1) - 30%; defendant two (D^2) - 50%. The plaintiff's verdict would be for a total of \$80,000 against D^1 and D^2 as joint tortfeasors. Supposing the plaintiff executed against D^1 for the entire judgment and D^1 satisfied it, D^1 would have an equitable claim for partial indemnity against D^2 in the amount of \$50,000. Under this approach, the comparative fault system's aim of improving the compensation function of tort law will have been achieved without sacrificing the fundamental fairness of the apportionment principle.

Precedent for this approach exists in other jurisdictions.¹⁸⁵ One court has grounded the remedy solidly upon the principle of fairness in preventing unjust enrichment.¹⁸⁶ Another has relied heavily upon principles of restitution to create an equitable "contribution based upon relative fault."¹⁸⁷ The label is theoretically unimportant.¹⁸⁸ In this new era of tort law in Indiana, the principles driving the comparative fault system should be given full play for the benefit of all parties whose rights and obligations are to be adjudicated under that system. The old common law rules of contribution and indemnity served their purpose in a system of unrefined determinations of fault. Their simplicity and ease of administration suited them well in that system. Those qualities alone do not justify their perpetuation in the new system. Contributory negligence is, after all, a simple and easily administered principle in contrast to apportionment of fault. The Indiana legislature's ban on contribution has petrified that doctrine and preserved it as a relic of the past. The doctrine of indemnity is still a part of the living common law. The Indiana courts should not shrink from applying their equitable powers to fashion a

¹⁸⁴See Leflar, *supra* note 161, at 136; W. PROSSER, *supra* note 74, at 310.

¹⁸⁵The leading case is *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). See also *American Motorcycle Ass'n v. Superior Court of Los Angeles County*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362 (Minn. 1977); *Missouri Pac. R. Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466 (Mo. 1978).

¹⁸⁶*Missouri Pac. R. Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466, 469-70 (Mo. 1978).

¹⁸⁷*Tolbert v. Gerber Indus., Inc.* 255 N.W.2d 362, 367 (Minn. 1977).

¹⁸⁸What the remedy is called may induce a more receptive attitude, however. A given court may be more inclined to apply the principles of restitution to prevent a tortfeasor from being unjustly enriched than it would to create a new doctrine of "partial indemnity," even though the function is the same.

new remedy from the elementary principle of fairness, a common denominator of indemnity and comparative fault.

G. Section 8: Government Entity and Public Employee Exceptions

Section eight of the Act, which will be invoked in cases arising under the Indiana Tort Claims Act, proclaims that the Comparative Fault Act "does not apply in any manner to tort claims against governmental entities or public employees under I.C. 34-4-16.5."¹⁸⁹ Since the Act does not apply, any plaintiffs suing under the Tort Claims Act will be subject to common law defenses and principles of liability.¹⁹⁰ Those plaintiffs' claims will be completely barred for any contributory negligence,¹⁹¹ and defendants will be foreclosed from invoking the apportionment principle. By this section, the Indiana General Assembly has again equivocated on its acceptance of the comparative fault system of liability. If governmental entities and their employees operated in a world insulated from general social intercourse, a dual system of liability would raise only policy considerations: the fairness of the duality, the economics of maintaining two systems, and the question of whether societal interests in protection from harm are adequately served by the two systems. Government workers are, however, actively involved in daily life. Many of the passersby at any busy intersection are likely to be carrying out some governmental function. The possibility of a claim involving the government worker as a joint or concurrent tortfeasor is not remote. In such a case, the problems of a dual system of liability become acute. Practical issues in the administration of a dual system are joined with and underscore the considerations of fairness, economics, and utility of preserving the otherwise abandoned common law negligence doctrine for the benefit of government.

If a plaintiff alleges that the negligence of a government worker, *A*,¹⁹² and a private individual, *B*, combined to injure him, the Indiana Act's misplaced deference to government immediately presents the court with difficulties in managing the case. The court has two options: (1) to separate the governmental case from the non-governmental case and

¹⁸⁹IND. CODE § 34-4-33-8 (Supp. 1984).

¹⁹⁰See *City of Fort Wayne v. Cameron*, 267 Ind. 329, 333-34, 370 N.E.2d 338, 340-41 (1977) and cases cited therein.

¹⁹¹Any contributory negligence that is overcome by the last clear chance doctrine will, of course, not bar the plaintiff's action. See the discussion of the last clear chance doctrine in the context of comparative fault, *infra* notes 465-501 and accompanying text.

¹⁹²For the sake of simplicity, it is assumed that the government would also be sued. At any rate, the Tort Claims Act requires the governmental entity to pay the judgment against an employee "when the act or omission causing the loss is within the scope of his employment, regardless of whether the employee can or cannot be held personally liable for the loss and when the governor, in the case of a claim or suit against a state employee, or the governing body of the political subdivision, in the case of claim or suit against an employee of a political subdivision, determines that paying the judgment . . . is in the best interest of the governmental entity." IND. CODE § 34-4-16.5-5(b) (1982).

conduct two trials, or (2) to try the case as a normal multiple defendant case, instructing the jury differently with respect to the two defendants.

The first option requires a total duplication of effort and expense. It may present difficulties of proof, and the jury will have to be carefully instructed to prevent confusion about why it should not consider one of the actors involved in the case. For these reasons a court might decide to try the case at one time under both systems of liability.

The second option, to try the case as a normal multiple defendant case but with separate jury instructions for each defendant, has nothing to recommend it over the first. Approaching the case this way would require an explanation to the jury that *B*'s fault is to be apportioned, but *A*'s fault is not. Concerning *B*'s liability to the plaintiff, *B* could argue that *A* should be treated as a "nonparty," thereby reducing the ultimate damages award. The plaintiff would counter by saying *A* is not technically a "nonparty" under the Act's definition of that term,¹⁹³ and that *B*'s liability should not be reduced by bringing *A* into the case when the Act "does not apply in any manner" to *A*. If a court accepts *B*'s "nonparty" argument, it will be faced with explaining to the jury how a party *present* in the case is to be treated as a "nonparty" for the purposes of comparative fault for *B*, and then explaining how that same "nonparty," *A*, is liable to the plaintiff without apportionment. If the plaintiff's argument is accepted, however, apportionment of "fault" against either tortfeasor would be inappropriate.

The matter gets more complicated if the plaintiff is partly at fault. One problem arises if two trials are conducted and the jury finds the plaintiff at "fault" in the trial against *B*. In the subsequent trial against *A*, the defendant might assert that the finding of "fault" in the case against *B* ought to be binding in the plaintiff's case against *A*. The plaintiff should be able to successfully overcome *A*'s assertion by pointing out that the principles of collateral estoppel do not support *A*'s assertion; *A* would be seeking to benefit from collaterally estopping the plaintiff from relitigating the issue of "fault" without having risked liability in the trial against *B*.¹⁹⁴ If the jury in *A*'s trial finds the plaintiff free of "fault," *A* has no way of using the fact findings in *B*'s trial to impeach the second verdict. The plaintiff is under similar limitations if he decides to litigate the claim against *A* first: he may not use the findings in *A*'s

¹⁹³IND. CODE § 34-4-33-2(a) (Supp. 1984).

¹⁹⁴Since defendant *A* was not actually a party to the plaintiff's action against *E*, sufficient identity of parties would be lacking for *A* to attempt to estop the plaintiff from claiming that the issue of "fault" was open in his claim against *A*. See *Indiana State Highway Comm'n v. Speidel*, 181 Ind. App. 448, 392 N.E.2d 1172 (1979). Compare *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), with *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) (cited by the *Speidel* court for the proposition that the identity of parties requirement of collateral estoppel has been abandoned in federal courts.).

trial (such as a finding that he was not contributorily negligent) to his benefit in the trial against *B*.¹⁹⁵

Regardless of whether two trials are conducted, issues concerning the plaintiff's ultimate right of recovery arise in cases involving governmental and nongovernmental defendants. Since the Act does not apply in the case against *A*, for example, a judgment against *A* would entitle the plaintiff to seek satisfaction for the entire amount of his damages against *A*. Normal principles of joint and several liability would prevent *A* from resisting the plaintiff's attempts to recover the entire judgment.

If the plaintiff obtains a favorable verdict in the case against *B* and executes on that judgment first, other problems arise. For example, assume the jury found the plaintiff's unadjusted damages to be \$100,000, *A*'s "fault" to be 40%, and *B*'s "fault" to be 60%.¹⁹⁶ If the plaintiff obtains satisfaction of the \$60,000 judgment against *B*, should the court entertain *A*'s claim that she should benefit from the apportionment, even though the Act does not apply, and limit the plaintiff's execution against *A* to \$40,000?¹⁹⁷ The argument by *A*, that the plaintiff would enjoy a windfall if permitted to recover the full \$100,000 from *A* in addition to the \$60,000 from *B*, might seem fairly persuasive. It is not entirely clear, however, that *A* should be heard to make that argument under the collateral source rule.¹⁹⁸ Given the Act's inapplicability, *A* is vulnerable to the counterassertion that a limitation of recovery would amount to a windfall for her.

The amount of legislative detail necessary to address all of these

¹⁹⁵Principles of due process prevent fact findings in the trial against *B* from being used to *A*'s detriment in the trial against her. The nonmutuality of parties (the plaintiff was not proceeding against *A* in the trial against *B*) prevents findings of fact from being used by *A* to the plaintiff's detriment. These principles are not dependent upon a judgment having been rendered in the first trial. They should therefore be applicable in a situation where the court conducts the proceedings pursuant to Indiana Trial Rule 42. Compare the federal court's allowance of collateral estoppel in *Barron v. United States*, 654 F.2d 644, 649 (9th Cir. 1981).

¹⁹⁶This example assumes that *A* is treated as a "nonparty." See *infra* text accompanying notes 200-34.

¹⁹⁷The plaintiff need not seek satisfaction first from *B* for this type of problem to arise. If he first obtained satisfaction of the entire judgment from *A*, it is unclear whether *B* would have a claim that the judgment against her should be discarded. If the Act is construed to have abolished joint and several liability with respect to the claim against *B*, upon what basis would *B* assert that the judgment against her had been discharged? See *supra* text at notes 90-94. Furthermore, payment of tort claims against governmental agencies is subject to approval by that entity as being "in the best interest of the governmental entity." IND. CODE § 34-4-16.5-5(b) (1982). If the decision of the governmental entity is that payment should be limited by the apportionment of "fault" to the government employee, has not the entity in essence applied the Act for its own benefit?

¹⁹⁸See *Evans v. Breeden*, 164 Ind. App. 558, 561, 330 N.E.2d 116, 118 (1975) (quoting 9 I.L.E. *Damages* § 86: "Compensation for the loss received by plaintiff from a collateral source, independent of the wrongdoer, as from insurance, cannot be set up by the wrongdoer in mitigation of damages.")

issues probably means they will have to await judicial treatment. If such a case is ever brought to litigation, uncertainty and confusion from the Act's preservation of the old system for Tort Claims Act cases seems unavoidable.

Section eight is alleged to have been another fruit of the political compromise necessary to obtain passage of the Act.¹⁹⁹ No legal reasons have been publicly offered in support of that compromise, and none are apparent. Indiana's exclusion of governmental entities is unique among statutory enactments of comparative fault. Maintenance of the dual systems of liability which the exclusion requires should have more to recommend it. The exclusion should be repealed.

H. Section 10: The "Empty Chair Defense"

One of the main points of contention between proponents and opponents of the bill proposing comparative fault in Indiana was whether the fact finder should be able to take into account the culpable conduct of persons not party to the lawsuit in its apportionment of fault.²⁰⁰ From the defendant's point of view, any culpability attributable to another person ought to reduce the defendant's share of liability in a system based upon apportionment of fault. If the jury must find that the combined fault of the named parties totals 100%, some distortion of apportionment must inevitably result in cases where more than one tortfeasor contributed to the injury, but not all tortfeasors were named in the action. If, for example, one tortfeasor was impecunious or could present circumstances which might evoke the sympathies of the fact finder, the plaintiff might deliberately refrain from naming that tortfeasor as a defendant in the hopes of enhancing the chances or extent of recovery. The named defendant would then likely bear full responsibility, having committed only part of the fault which contributed to the injury, since the "total fault" of the *named* parties would have to equal 100%.²⁰¹ In effect, the plaintiff could enjoy the advantage of injecting the non-present actor's fault into the case without the disadvantages presented by that actor's peculiar circumstances. The nonpresent actor would be figuratively represented by an "empty chair" in the courtroom. A faceless, nameless entity whose only meaningful quality was fault would occupy that chair, and the only way such fault could be accounted for would be to attach it to the other parties to the action. If the plaintiff were found to be free of fault, the entire burden of this phantom

¹⁹⁹Remarks of Mr. Bayliff, *supra* note 87.

²⁰⁰*Id.*

²⁰¹To illustrate, assume two actors equally at fault in producing the plaintiff's injury. If one actor was insolvent and the fact finder found each of the actors 50% at fault, the plaintiff's actual recovery would be limited by 50%. If the insolvent actor was not named in the suit and the fact finder could not take her fault into account, the plaintiff could impose 100% of the liability upon the solvent actor by refusing to name the insolvent.

defendant's fault would be borne by the named defendant. Facing the possibility of such a distortion of the apportionment principle, a defendant would want the system to be capable of factoring all culpable acts into the apportionment formula. Two methods for attaining that objective are (1) requiring the plaintiff to name all actors thought to be at fault as defendants, or (2) permitting the finder of fact to consider nonpresent persons' fault in the apportionment decision and allowing the "fault" of the named parties to total less than 100%.

From the plaintiff's point of view, neither of the two alternatives is inherently attractive. The first requires the plaintiff to name all potentially liable actors, regardless of the magnitude of that potential liability or the other disadvantages of having those actors as parties to the action. Multiple actor cases might become unwieldy, expensive, or time-consuming in ways not commensurate to the fragments of compensation recoverable from some actors. Some tortfeasors may be people whom the plaintiff would prefer not to sue if given the choice, such as relatives. Other tortfeasors may be immune, and to name such persons might be a dry exercise. The second alternative requires the plaintiff to bear the burden of the nonpresent person's culpability, since any "fault" attributed to that person means a proportionate reduction of the verdict obtained in the cause of action.

On a relative scale, the second alternative permits some discretion by plaintiffs, and would be generally preferable over the first. If the plaintiff saw no disadvantage in naming all potentially liable actors to the lawsuit, he would be permitted to do so under the second alternative while retaining the flexibility to leave some persons out of the case if he believes the reduction in the ultimate verdict to be an acceptable cost. The Indiana Comparative Fault Act adopts the second alternative in the form of an affirmative defense. Section ten, added by the 1984 amendments, permits a defendant who pleads the defense to "assert . . . that the damages of the claimant were caused in full or in part by a nonparty."²⁰² The plaintiff in such a case still bears the burden of proof with respect to the causal connection between the tortfeasors' fault and the injury,²⁰³ but if a defendant pleads a "nonparty defense"²⁰⁴ she must prove the causal connection between the nonparty's actions and the plaintiff's damages.²⁰⁵

The section imposes specific time limits for raising the defense, but confers some discretion upon the trial court to provide some flexibility.

²⁰²Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 5, § 10(a), 1984 Ind. Acts 1468, 1471 (codified at IND. CODE § 34-4-33-10(a)).

²⁰³IND. CODE § 34-4-33-10(b).

²⁰⁴*Id.* § 34-4-33-10(a).

²⁰⁵*Id.* § 34-4-33-10(b).

Generally, the defense must be pleaded when the defendant knows of it, except that when the plaintiff has served the complaint more than 150 days before the expiration of the statute of limitations for the action against the nonparty, the defendant has until 45 days before the expiration of the period of limitations to plead it.²⁰⁶ The court is empowered to adjust the time limits so long as the defendant has a "reasonable opportunity to discover the existence of a nonparty defense"²⁰⁷ and the plaintiff has time to name the nonparty as a defendant before the statute of limitations expires.²⁰⁸

If the defendant is a "qualified health care provider" under the Medical Malpractice Act,²⁰⁹ section ten applies to claims brought pursuant to that Act.²¹⁰ However, the "nonparty defense" must be pleaded within 90 days from the date the plaintiff's claim was filed with the insurance commissioners.²¹¹ The court is given similar power to modify the time limit in malpractice proceedings under restrictions similar to those in ordinary lawsuits.²¹² This subdivision ensures that the medical review panel, required by the Medical Malpractice Act, will be timely apprised of any assertion that the plaintiff's injury was wholly or partially caused by anyone other than the defendant named in the original claim before it begins its determination of the issues of causation and breach of the standard of care.²¹³

Recognition of the nonparty defense by section ten thus forecloses plaintiffs' use of the "empty chair" strategy and places it in the hands of defendants. If the plaintiff is unwilling or unable to name the person the defendant asserts as another source of the plaintiff's injuries, the defendant will attempt to attribute as much "fault" as possible to the phantom occupant of the "empty chair" in order to reduce her own share of liability. Where the plaintiff chooses not to name the other person as a defendant, this defense is consistent with principles of fairness and apportionment of fault since it will ensure that the defendant bears no more than her proportionate share of liability, and any resultant reduction of the plaintiff's compensation will stem from the plaintiff's own choice.

When the plaintiff is *unable* to name the nonparty, however, the defense may strain both the fairness and apportionment principles. In such a case, the nonparty is not a party to the suit for reasons beyond the plaintiff's control. The identity of the nonparty may be unknown

²⁰⁶*Id.* § 34-4-33-10(c).

²⁰⁷*Id.* § 34-4-33-10(d)(1).

²⁰⁸*Id.* § 34-4-33-10(d)(2).

²⁰⁹IND. CODE tit. 16, art. 9.5 (1982).

²¹⁰IND. CODE § 34-4-33-10(d). *See also infra* notes 235-41.

²¹¹IND. CODE § 34-4-33-10(d).

²¹²*Id.* § 34-4-38-10(d)(1), (2).

²¹³*See generally* IND. CODE §§ 16-9.5-9-1, -10 (1982).

to the parties, or the person may be beyond the jurisdiction of the court or immune from liability. In the usual two-party situation outside the Act's application, these conditions would prevent the plaintiff's recovery. These conditions, however, affect the legal relation of the plaintiff and the would-be defendant. In the multiple actor case, the legal relations between the plaintiff and the defendant on the one hand, and the plaintiff and the nonparty on the other, do not seem so inherently connected that the former should be affected by flaws in the latter. The concept of joint and several liability might supply a connection in logic, policy, fairness, or precedent in some cases, but that concept and its elements would argue in favor of the plaintiff and full liability, not in favor of the defendant and reduced compensation.

The defense permits an over-emphasis of notions of causation to encroach upon the apportionment decisions of the fact finder. Faced with multiple actor cases, even where it is clear that the named defendants' acts satisfy all legal requirements of a cause of action founded upon fault, juries will be asked to segment the cause of action as if it were a series of actions against several individuals rather than a single action against a group of actors. In cases of indivisible injuries, juries will be asked to pretend that those injuries are capable of division, and that this divisibility logically follows from an apportionment of fault. The comparative fault system in general is founded upon the important fiction that the fact finder is capable of ascertaining portions of fault from the facts of the case with precision. The "empty chair" defense presses that fiction into service beyond what it can comfortably bear in cases of this sort.

One potential problem if an "empty chair" defense is available is the situation where a worker is injured at the workplace as a result of the combined fault of his employer and a third party, and the worker sues the third party. The employer, being immune from tort liability, could not be named as a party to the tort action. If the third party tortfeasor were to be able to raise the employer's fault as a "nonparty defense" under section ten, serious difficulties would arise in connection with the plaintiff's ultimate recovery and the employer's right to obtain reimbursement for payments made pursuant to the workers' compensation statutes.²¹⁴ The potential difficulty presented is that the plaintiff would suffer a double reduction of compensation if his verdict were reduced by the amount of the employer's "fault" and then he had to reimburse that employer from the proceeds of the already reduced verdict. Section ten does not specifically address this problem, but it has been solved by the 1984 amendments' definition of "nonparty," which specifically

²¹⁴The problem is discussed in greater detail in conjunction with the examination of section twelve. See *infra* text accompanying notes 242-305.

excludes employers.²¹⁵ Third party tort actions brought by workers will, therefore, be treated as if the conduct of the employer is not involved. That is not to say that the employer's conduct is capable of being ignored in the presentation of the case and the assignment of accountability. Plaintiffs' counsel would accordingly be well-advised to make sure that the jury is fully and clearly instructed on the law in this regard, so that it understands that it is not to attribute to the employer any responsibility for the plaintiff's injury, either in the percentages of fault it computes or in the determination of damages before adjustment. The Act's suggested jury instructions, even with removal of the "nonparty" language, are clearly inadequate for such purposes.

Allegiance to the apportionment principle argues strongly in favor of the defense. If the named defendant is made to bear the consequences of the absent actor's fault, apportionment of fault would seem to have been scrapped for the sake of compensating plaintiffs. At this level of simplicity, and from a defense orientation, the objection appears to be well-taken. It should be remembered, however, that the policy of expanding the compensation function is at least as important as the policy of applying the apportionment principle in the adoption of comparative fault. Considerations of fairness support the defense where plaintiffs' choice of strategy is the primary reason for imposing the burden of someone else's fault on the defendant. Where no one has *chosen* to leave that other person out of the lawsuit, fairness principles strongly suggest that *both* the defendant and the plaintiff should bear the burden; resolution of the matter should not be dependent upon a simplistic notion of apportionment oriented either toward plaintiffs' *or* defendants' interests. If the plaintiff and the defendant hurt *each other* in combination with a third person, they would each participate in the benefits and burdens of the nonpresence of that third party.²¹⁶ The same should be true where the plaintiff is the only person to have been injured. Section ten casts the entire burden upon the plaintiff regardless of the reason for the nonparty's absence from the suit, and thereby tilts the balance of fairness in defendants' favor. The noninjured defendant has no more

²¹⁵Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2(a), 1984 Ind. Acts 1468, 1468-69 (codified at IND. CODE § 34-4-33-2(a)).

²¹⁶For example, if the plaintiff were found to be 30% at "fault," the defendant 40%, and the third party 30% at "fault," plaintiff would recover 40% of his damages and defendant 30% of her damages under the defense; each shares proportionately the burden of the defense. However, if the fact finder was not permitted to take the third party's "fault" into account, the plaintiff's proportion of "fault" becomes 42.9%, and the defendant's becomes 57.1%. Pursuant to the Act's "greater than 50%" rule, the defendant's recovery would be totally barred. The defense permits the defendant to avoid this harsh result. Furthermore, this benefit of the defense is not dependent upon the status of the parties as plaintiff or defendant; the same result is produced where plaintiff's and defendant's percentages of fault are reversed.

of a claim for strict adherence to the apportionment principle than does the injured plaintiff. When the plaintiff must absorb the fault of the phantom defendant, as much distortion of the apportionment principle occurs as when the defendant must, and forcing the plaintiff to accommodate also impairs the compensation principle.

The problem of malapportionment demonstrates that the issues raised by a nonpresent tortfeasor are not simple. Simplistic, one-way rules to supply answers to those issues are not satisfactory. The "empty chair" defense has received far less than unanimous acceptance by other authorities. The Indiana Act goes well beyond the position taken by the National Commissioners in the Uniform Act, for example. That body believed it better to keep the fault of third persons out of the lawsuit unless those persons could be named as parties.²¹⁷ The commissioners recited the lack of "certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him," plus the fact that the determination of none of those issues could be binding upon the nonparty, in support of its position.²¹⁸ Courts of California,²¹⁹ Kansas,²²⁰ Oklahoma,²²¹ West Virginia,²²² and Wisconsin²²³ have required the acts of all persons to be taken into account in apportionment decisions, regardless of whether they have been named as parties to the lawsuit. However, under various circumstances, courts in Arkansas,²²⁴ Florida,²²⁵ Hawaii,²²⁶ Oregon,²²⁷ and South Dakota²²⁸ have excluded the fault of persons not named as parties from consideration by the fact finder.

Even the treatise writers disagree. Mr. Schwartz believes "[a] result more compatible with the goals of comparative negligence is reached by determining the negligence of all concurrent tortfeasors irrespective of

²¹⁷UNIFORM ACT, *supra* note 7, commissioners' comment at 39.

²¹⁸*Id.*

²¹⁹*American Motorcycle Ass'n v. Superior Court of Los Angeles County*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

²²⁰*Geier v. Wikel*, 4 Kan. App. 2d 188, 603 P.2d 1028 (1979).

²²¹*Paul v. N.L. Indus., Inc.*, 624 P.2d 68 (Okla. 1980).

²²²*Bowman v. Barnes*, 282 S.E.2d 613 (W. Va. 1981).

²²³*Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934).

²²⁴*See H. Woods*, *supra* note 27, § 13.3, at 224-25.

²²⁵*Kapchuk v. Orlan*, 332 So. 2d 671 (Fla. Dist. Ct. App. 1976) (other parties' collisions with plaintiff's automobile subsequent to defendant's collision treated as plaintiff's contributory negligence).

²²⁶*Sugue v. F.L. Smithe Machine Co., Inc.*, 56 Hawaii 598, 546 P.2d 527 (1976). *But see Barron v. United States*, 473 F. Supp. 1077 (D. Hawaii 1979), *rev'd in part*, 654 F.2d 644 (9th Cir. 1981) (apportioning fault of employer immune to direct suit by injured worker).

²²⁷*Conner v. Mertz*, 274 Ore. 657, 548 P.2d 975 (1976).

²²⁸*Beck v. Wessel*, 90 S.D. 107, 237 N.W.2d 905 (1976) (applying guest statute: host's negligence not used to reduce plaintiff passenger's recovery).

whether they are parties to the suit.''²²⁹ Judge Woods, having compared cases from jurisdictions with opposing views, concludes that

[i]t is unrealistic to ask jurors to determine percentage of fault of tortfeasors who are not before the court. A reading of the case reports demonstrates that the Wisconsin practice has proved vexatious to its courts. On the other hand, by only apportioning fault among parties actually before the court, Arkansas has had no demonstrable problems.²³⁰

With respect to both writers, as this brief discussion has attempted to demonstrate, the issue is not as simple as either of them would have it. The focus of the system should not be so narrow as to exclude accommodation of either the apportionment principle or the need for judicial efficiency. At this late date of development, comparative fault systems should be refined enough to offer a flexible approach based upon equitable principles to avoid or resolve practical problems without departing from the elemental concepts of the system of liability. Rather than imposing a rigid one-way rule which requires one party or the other to bear the burden of the nonpresent actor's fault, a comparative fault system ought to be able to take the peculiar circumstances of a given case into account. Some circumstances may well exist under which it is both realistic and reasonable to expect the fact finder to apportion fault to a nonparty. That may especially be true where the plaintiff chooses not to name that person. Where the absence of a tortfeasor is not attributable to the decision of any of the parties to the action or where it is not reasonable to expect a jury to assess the fault of the nonpresent actor, the courts should have the ability to equitably distribute the burden among all of the named parties. A workable system might be one similar to the Uniform Act's treatment of released, insolvent, or immune tortfeasors, where the plaintiff's claim is reduced in proportion to a released tortfeasor's equitable share of fault, and all present parties equitably share the burden of an insolvent or immune defendant's liability.²³¹ The system assuredly is not as simple as a one-way rule, and requires coordination of the apportionment function with rules of joint and several liability, rights of contribution and indemnity, motions practice, and the courts' exercise of equitable jurisdiction. In the tort system's adjustment of rights between people, in which compensation for injuries is determined by close evaluation and assignment of quantum of culpability, however, simplicity is not necessarily a virtue.

When the 1984 amendments added the "empty chair" defense to the Act, the suggested jury instructions in section five were only cosmetically amended; they do not truly reflect the substance of section

²²⁹V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 122 (Supp. 1981).

²³⁰H. WOODS, *supra* note 27, § 13.3, at 224-25.

²³¹UNIFORM ACT, *supra* note 7, §§ 2, 6 and commentary.

ten. Section ten makes the defense an affirmative defense, and places the burden upon the defendant. Where the defendant does not raise the defense, it clearly would be improper to instruct the jury to "determine the percentage of fault . . . of any person who is a nonparty,"²³² since even when the defense is raised the fact finder may not automatically consider "*any* person who is a nonparty," as these instructions suggest. Together, the Act's definition of a "nonparty" as "a person who is, or may be, liable to the claimant in part or in whole for the damages claimed,"²³³ the requirement that the jury name the "nonparty"²³⁴ in the verdict, and the specificity with which section ten treats the defense, indicate quite strongly that the fact finder is not to assign accountability for the plaintiff's injuries to just any person whose actions the fact finder believes to be faulty. The incentives to name all potential defendants are strong enough that a case involving a valid nonparty defense will be relatively infrequent, placing the general applicability of the suggested instructions in further doubt, and enhancing the responsibility of the bench and bar to ensure that usage of the instructions do not become routine and automatic.

I. Section 11: Coordination Between the Comparative Fault and Medical Malpractice Acts

When an injured person has been harmed by several people, some of whom are "qualified health care providers" under the Medical Malpractice Act and some of whom are not, the injured person would face possible problems of coordinating the actions against the various parties unless one or the other of the two Acts made allowance for the medical review panel process of the Medical Malpractice Act. That Act does not permit a tort action against certain qualified defendants until a review panel has rendered its opinion on issues of causation and breach of the applicable standard of care.²³⁵ If a nonqualified defendant's conduct had combined with the qualified defendant's, the action against the nonqualified defendant might reach the trial stage before the preliminaries under the Medical Malpractice Act had been completed.²³⁶

²³²IND. CODE § 34-4-33-5(a)(1), (b)(1).

²³³*Id.* § 34-4-33-2(a).

²³⁴*Id.* § 34-4-33-6. The requirement of section six, that the party be named, probably does not mean that the defense will fail unless the person can be named with specificity. Under proper circumstances, a "John or Jane Doe" identification should suffice. However, the requirement clearly indicates that the defendant cannot raise a complete phantom from the realm of conjecture and require the jury to surmise that someone else "must or may have" contributed to the plaintiff's injury.

²³⁵IND. CODE § 16-9.5-9-2 (1982).

²³⁶Delays in the process have been acknowledged by the Indiana Supreme Court in *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585 (Ind. 1980). A recent trial level decision, citing Department of Insurance statistics showing that the average case filed with the insurance commissioners takes nearly two years from the filing date to receive a

Section eleven solves the problem by permitting the trial court to "grant reasonable delays"²³⁷ in the action against the nonqualified defendant "until the medical review panel procedure can be completed."²³⁸ If the review panel procedure produces an opinion allowing the malpractice action to proceed, the court must permit the plaintiff to join the qualified defendant as party to the tort action begun against the nonqualified defendant.²³⁹

This compulsory continuance and joinder provision of section eleven relieves a plaintiff from the problems of conducting simultaneous proceedings dealing with the same set of facts. More importantly, it permits the plaintiff to file an action against the nonqualified defendant within the period of limitations without fear that the delays in the medical malpractice proceedings would set up a "nonparty defense" for the nonqualified defendant.²⁴⁰ Had the Comparative Fault Act not provided for this coordination, the nonqualified defendant might well have been successful in convincing the fact finder to attribute some "fault" to the qualified defendant, even though it turned out later that the medical review panel's opinion foreclosed suit against the qualified defendant. In such a case, the plaintiff would have had a reduced recovery against the nonqualified defendant, but no recovery against the qualified defendant. Section eleven's language could fairly be interpreted as indicating that the Comparative Fault Act gives the nonqualified defendant no "empty chair" defense respecting the qualified defendant's conduct. "Nonparty" is defined by section two as a "person who is, or may be, liable to the claimant."²⁴¹ Since section eleven permits continuance of the action against the nonqualified defendant until the medical review panel decision has been reached, an opinion by that panel in favor of the health care provider would not only foreclose further proceedings against the provider, it would sweep the provider out of the definition of "nonparty," and thereby prevent the nonqualified defendant from asserting that the medical provider was at fault.

J. Section 12: The Diminution of Subrogation Claims, Liens, and Claims

1. Introduction.—The named parties in a tort action are not always the only entities interested in the outcome of the litigation. Often the

medical review panel opinion, held the Medical Malpractice Act unconstitutional. *Warnick v. Cha*, S.D., 83-169, at 10 (Jasper Cty. Sup. 1983) (violating both the Indiana and the United States Constitutions in depriving claimants of the "right to free access of the courts.")

²³⁷IND. CODE § 34-4-33-11.

²³⁸*Id.*

²³⁹*Id.*

²⁴⁰*See supra* notes 200-34.

²⁴¹IND. CODE § 34-4-33-2.

injured party has received some assistance in dealing with the injury from some other person or organization, and that provider looks to the judgment obtained from the tort action as a source of reimbursement for the assistance. Usually the provider is an insurer who has paid all or some portion of the medical expenses of its insured. In the absence of insurance protection, the assistance may have come from a hospital or other medical care provider. In each case, the provider has legal remedies to secure reimbursement for expenditures made on the injured party's behalf. Section twelve of Indiana's Comparative Fault Act modifies the extent to which such providers may obtain reimbursement, by diminishing the legal devices of "subrogation claims or other liens or claims"²⁴² under certain conditions. Liens and subrogation rights pursuant to the Indiana Workmens' Compensation Act and Occupational Disease Act, however, are specifically excluded from the section's operation, and require separate consideration.

2. *Subrogation Claims.*—To obtain reimbursement for designated expenses, an insurer employs a clause in the insurance contract conferring upon it the right of subrogation.²⁴³ The insurer may exercise the right by an action against the tortfeasor whose acts occasioned the need for the expenditures, or by a claim against the insured.²⁴⁴ The insurer has standing to sue the tortfeasor on the theory that the insurer is substituted for the injured party as the real party in interest, or, "standing in the shoes" of the insured it brings an action in the name of the insured.²⁴⁵ Where the insurer seeks to recover from its insured, the action is grounded in the theory of restitution; presumably, since the insured has recovered for the expenses related to the injury, it would be unjust to permit him to retain items of damages for which he has already been compensated.²⁴⁶ If the collateral source rule prevents the tortfeasor from reducing damages

²⁴²IND. CODE § 34-4-33-12 (Supp. 1984).

²⁴³The right probably is not dependent upon a subrogation clause. Rights in the nature of subrogation have been recognized in the common law at least since the seventeenth century, even when no subrogation clause was part of the contract. However, because the common law would not aid a volunteer in obtaining reimbursement for such expenditures, the conduct of the subrogee must be of sufficient character to have been more than that of a mere volunteer to invoke principles of equity based upon the concept of constructive trust. See Marasinghe, *An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine*, 10 VAL. U.L. REV. 45, 275 (1975). See also *Aetna Casualty & Sur. Co. v. Katz*, 177 Ind. App. 44, 377 N.E.2d 678 (1978) (subrogation allowed when insured paid claim despite later discovery that the actual cause of damage was not one covered by the provisions of the policy).

²⁴⁴16 COUCH ON INSURANCE 2D §§ 61:4, 61:26, 61:29 (rev. ed. 1983). See *Aetna Casualty & Sur. Co. v. Katz*, 177 Ind. App. 44, 377 N.E.2d 678 (1978) (action against tortfeasor). See generally 4 G. PALMER, THE LAW OF RESTITUTION § 23.16, at 447 (1978).

²⁴⁵16 COUCH ON INSURANCE 2D, *supra* note 244, §§ 61:26, 61:27, 61:36. See Marasinghe, *supra* note 243, at 295.

²⁴⁶In his treatise on Restitution, Professor Palmer argues that since proceeds from insurance do not always compensate fully for actual loss, a mechanistic presumption of

by the amount of benefits previously paid to the plaintiff, the possibility of overcompensation is removed by permitting the subrogated provider to recover the funds advanced.²⁴⁷

Section twelve of the Act applies to certain providers of "medical expenses or other benefits" for injured persons whose tort recovery has been reduced by apportionment of fault or uncollectibility of the judgment.²⁴⁸ Where the latter conditions exist, the "subrogation claim or other lien or claim . . . shall be diminished in the same proportion as the claimant's recovery is diminished."²⁴⁹ Thus, in a case where the plaintiff had been found 20% at "fault," the subrogated provider of medical benefits will be entitled to restitution of 80% of the amount advanced to the plaintiff.

On the face of it, this statutory reduction of the provider's rights may seem arbitrary and unfair. The connection between the plaintiff's "fault" in contributing to his own injuries and the obligation arising between the plaintiff and the provider does not seem close enough to warrant a reduction of the provider's rights. Consideration of the basis of accountability in the context of subrogation rights, however, places the provision in a broader perspective, and its fairness and consistency with the compensation function of comparative fault becomes apparent.

The subrogated injured party's obligation usually springs from a clause in the contract of insurance similar to the following:

In the event of any payment under the medical expense coverage of this policy, the company shall be subrogated to all the rights of recovery therefor which the injured person or anyone receiving such payment may have against any person or organization and such person shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person shall do nothing after loss to prejudice such rights.²⁵⁰

The obligation *need not* arise from such a subrogation clause, and may actually be based upon operation of law,²⁵¹ but in either case the nature

overcompensation in every case where the plaintiff recovers medical expenses in the tort judgment and from insurance proceeds is unwise, a departure from principles of unjust enrichment, and a failure to maintain a proper perspective upon the interests of the injured person. 4 G. PALMER, *supra* note 244, §§ 23.15-23.17.

²⁴⁷16 COUCH ON INSURANCE 2D, *supra* note 244, § 61:18, at 93-94; 4 G. PALMER, *supra* note 244, § 23.15.

²⁴⁸IND. CODE § 34-4-33-12.

²⁴⁹*Id.*

²⁵⁰4 G. PALMER, *supra* note 244, § 23.18, at 457 (quoting *Peller v. Liberty Mut. Fire Ins. Co.*, 220 Cal. App. 2d 610, 34 Cal. Rptr. 41 (1963); *Shelby Mut. Ins. Co. v. Birch*, 196 So. 2d 482 (Fla. Dist. Ct. App. 1967); *Demmery v. National Union Fire Ins. Co.*, 210 Pa. Super. 193, 232 A.2d 21 (1967)).

²⁵¹16 COUCH ON INSURANCE 2D, *supra* note 244, § 61:2, at 75-76, § 61:19.

of the subrogated provider's right is the same: the provider is entitled to be placed in the position of the injured party with respect to recovery for the expenses paid.²⁵² Since the right is thereby tied to the underlying right of the injured party to recover against the tortfeasor,²⁵³ and is in that sense derivative, it is subject to the defenses which the tortfeasor might raise against the injured party.²⁵⁴ Thus, in a contributory negligence system, if the plaintiff's action is barred by his own fault, the provider's right of recovery under subrogation is also extinguished.²⁵⁵ No money judgment in the underlying action can exist to provide a source of funds from which subrogation reimbursement may come. Given that restitution is the underlying theory of recovery, the equitable principle is not invoked in such a case because the plaintiff has not been unjustly enriched.²⁵⁶

The function of restitution theory in preventing unjust enrichment similarly operates where the provider seeks reimbursement from the injured recipient rather than from the tortfeasor. If the subrogated plaintiff recovers some damages in the tort judgment, but less than full compensation for the injury, the provider is not entitled to full reimbursement.²⁵⁷ The burden is upon the party asserting the right to restitution to prove that the recipient of the benefits would be unjustly enriched if permitted to retain both the judgment recovery and the payments advanced by the provider.²⁵⁸ Some courts have used "equitable distribution" in cases where the recovery has not been sufficient to cover all of the plaintiff's losses plus the amount claimed for reimbursement. The principle gives priority to the injured party's interests and the subrogee obtains reimbursement only after the injured party has received full compensation.²⁵⁹

In a comparative fault system, the plaintiff's partial fault will not necessarily bar his tort action, of course, and cases will arise in which recovery will represent less than full compensation for the injured party. Juries operating under the Indiana Comparative Fault Act and the Indiana Rules of Trial Procedure will render general verdicts which contain no itemization of the elements of damages awarded or the extent to which those elements are valued.²⁶⁰ It would be impossible for an insurer to establish any certain amount of restitution to which it was entitled in such cases because it could not show how much, if any, of the recovery

²⁵²*Id.* § 61:36, at 118.

²⁵³*Id.* § 61:212 at 274.

²⁵⁴*Id.*

²⁵⁵*Id.*

²⁵⁶See 4 G. PALMER, *supra* note 244, § 23.15, at 440.

²⁵⁷See *id.* at 438-39, § 23.18 at 468-476; 16 COUCH ON INSURANCE 2D, *supra* note 244, § 61:43.

²⁵⁸4 G. PALMER, *supra* note 244, § 23.18, at 470-71.

²⁵⁹16 COUCH ON INSURANCE 2D, *supra* note 244, § 61:44.

²⁶⁰Indiana Trial Procedure Rule 49 abolishes special verdicts and interrogatories to the jury. See *supra* text accompanying notes 138-47.

pertained to medical expenses. Generally, where the plaintiff's medical expenses were established at a fixed amount and the verdict in the tort action was sufficient to cover all of the plaintiff's alleged losses, the difference between the verdict amount and the amount established for medical expenses could fairly be said to cover all items of damages *except* medical expenses. In a comparative fault case, the inference cannot so easily be drawn. For example, if the plaintiff's unadjusted damages were assessed at \$100,000, and the plaintiff had offered proof of \$10,000 in medical expenses, at this stage \$90,000 would represent recovery for nonmedical losses. That conclusion would not hold up if the plaintiff had been found to be 10% at "fault." The resulting verdict would be \$90,000, the plaintiff might assert that full compensation had not been received, and that he therefore had not been unjustly enriched. To the extent that subrogation rights against the injured party are dependant upon unjust enrichment, which must be proved by the provider, the subrogated provider's claim of unjust enrichment could be wholly undermined by reduction of damages according to apportioned fault.

Section twelve of the Act purports to save such subrogees from losing their subrogation claims. Had the Act been silent on the question of its effect upon subrogation claims, the theory outlined above may have been employed to block attempts for reimbursement of medical payments "or other benefits."²⁶¹ Since the section addresses claims which assert rights of subrogation and requires that the claims shall be merely "diminished,"²⁶² the argument may be maintained that the legislature did not intend subrogees' rights to be defeated. To justify the mere reduction of the right, the argument presumes that the overall percentage reduction of the plaintiff's recovery represents a rate of reduction pertaining to all items of damages asserted in the action. That is, in the hypothetical case presented above, the presumption is that the item of medical expenses (asserted by the plaintiff to total \$10,000) has been reduced by 10%. Extending the presumption would mean that \$9,000 of the \$90,000 verdict represents damages for medical expenses, and the plaintiff holds the \$9,000 for the provider.

The provision is arguably consistent with the compensation function of comparative fault since plaintiffs who are not found at "fault" will be treated as before and the effect of section twelve applies only to that class of plaintiffs which would have enjoyed no tort recovery at all under the contributory negligence system. Given the continued applicability of the collateral source rule, if plaintiffs who had received medical payments subject to contractual subrogation clauses were able to defeat subrogation claims by asserting less than full compensation recovery, the principle of *apportionment* of fault would be undermined.

²⁶¹IND. CODE § 34-4-33-12.

²⁶²*Id.*

Comparing the result under section twelve with the result if plaintiffs were able to rebuff subrogees on the above theory demonstrates the point. Assume the same facts as presented in the above hypothetical case: the plaintiff has suffered a \$100,000 loss which has been recognized by the jury. Medical payments in the amount of \$10,000 have been received subject to subrogation of the plaintiff's insurance carrier. The plaintiff has been found to be 10% at "fault." The verdict in favor of the plaintiff would then be \$90,000, and the plaintiff is able to collect the entire judgment. To this point, the plaintiff has received \$100,000 for his \$100,000 loss. If the carrier's subrogation right is defeated on the theory that the plaintiff's *tort recovery* is less than full compensation, the plaintiff will have obtained a net recovery of 100% of his alleged loss. No apportionment of compensation resources in relation to his "fault" will result; he will be in as good a position as the plaintiff who was free from fault. Applying section twelve to the facts would mean that the plaintiff would be required to honor the subrogation claim in the amount of \$9,000, less the insurer's share of litigation expenses.²⁶³ The plaintiff under those circumstances would receive a net \$91,000 in total compensation resources, a 9% reduction for his 10% of "fault." He will actually fare better than a plaintiff under similar circumstances who had no insurance. The resulting incentive to obtain protection for accidental injuries providing for advanced payments to ease the financial impact of such injuries may well be worth the partial contraction of subrogation rights under the provision.

A feature of the language of section twelve that may give pause in efforts to interpret and apply it is that it addresses subrogation *claims*, not the obligations secured by subrogation rights. A claim has two conceptual parts: the assertion that the subrogor is obligated to the subrogee, and the demand for restitution. The claim is not the obligation itself.²⁶⁴ The amount demanded may be diminished by certain factors extraneous to the obligation, but it does not necessarily follow that the underlying obligation is diminished. As a practical matter, however, unless an alternative remedy is available for discharging the remainder of the obligation after the diminished subrogation claim is satisfied, reduction of the claim is tantamount to reduction of the underlying

²⁶³See 16 COUCH ON INSURANCE 2D, *supra* note 244, § 61:47; 4 G. PALMER, *supra* note 244, § 23.18.

²⁶⁴See BLACK'S LAW DICTIONARY 224 (rev. 5th ed. 1979). Black's defines "claim" to include "right to payment" in the sense employed in the Bankruptcy Act § 101(4). That inclusion consolidates and reflects numerous references to statutory causes of action contained in the Revised Fourth Edition, but the former edition did not use the phrase. See also BALLANTINE'S LAW DICTIONARY 205 (3rd ed. 1969), which does not employ the phrase, emphasizes the *demand* aspect of the term "claim," and states that the term means "a cause of action for *some purposes*." *Id.* (emphasis added). The distinction being maintained here has to do with the substantive aspect of the obligation as contrasted with the procedural aspect of the right to seek satisfaction of that obligation.

obligation. The obligation may not have been fully discharged, but it remains uncollectible. Since rights of subrogation are so closely tied to the injured party's right of recovery against the tortfeasor, as the sample subrogation clause quoted above illustrates,²⁶⁵ the subrogee is limited to asserting a claim against the "fund" produced by the tort judgment.²⁶⁶ In this light, section twelve may accomplish indirectly what it does not do by direct language.

3. *Liens*.—A lien in its most general sense "is a charge against property that makes the property stand as security for a debt owed."²⁶⁷ Distinctions may be drawn between equitable, common law, and statutory liens in terms of the differing factual elements giving rise to them, the various classes of providers protected, the character and extent of property serving as the security, enforcement procedures, and the like, but the shared element between them is that the lien is a remedy for enforcement of an underlying obligation.²⁶⁸ The obligation may be in the nature of a debt created by contract, express or implied, or simply one that arises by the law of restitution to prevent unjust enrichment.²⁶⁹

If the provider of benefits is a hospital, the obligation arising from the express or implied contract between the injured party and the hospital is secured by a statutory lien.²⁷⁰ The lien attaches to the judgment obtained in the personal injury action against the tortfeasor.²⁷¹ The theory of restitution to prevent unjust enrichment is again the foundation for the remedy.²⁷² The lien, as distinct from the obligation, is a remedial right conferred by the law to "detain" the assets of the obligor for the purpose of permitting the obligee to obtain satisfaction.²⁷³ Destruction of the property thus encumbered means that the lien, if it has any independent existence at all, has nothing to which to attach; the underlying obligation, however, is not extinguished and the obligee may still pursue other remedial courses to obtain satisfaction.²⁷⁴ The same

²⁶⁵See *supra* text accompanying note 250.

²⁶⁶16 COUCH ON INSURANCE 2D, *supra* note 244, § 61:165.

²⁶⁷D. DOBBS, LAW OF REMEDIES § 4.3, at 248 (1973). See *Hubble v. Berry*, 180 Ind. 513, 103 N.E. 328 (1913).

²⁶⁸See D. DOBBS, *supra* note 267, § 4.3, at 248-50; G. DOUTHWAITE, ATTORNEY'S GUIDE TO RESTITUTION § 8.3, at 331 (1977); 1 L. JONES, A TREATISE ON THE LAW OF LIENS §§ 1-4 (1888); D. OVERTON, A TREATISE ON THE LAW OF LIENS: AT COMMON LAW, EQUITY, STATUTORY AND MARITIME § 8 (1883).

²⁶⁹D. DOBBS, *supra* note 267, § 4.3, at 249; G. DOUTHWAITE, *supra* note 268, § 8.3, at 332-33. See RESTATEMENT (SECOND) OF RESTITUTION ch. 3 (Tent. Draft No. 2, 1984).

²⁷⁰IND. CODE §§ 32-8-26-1, -2 (1982).

²⁷¹*Id.* See generally Annot., 25 A.L.R.3D 858 (1969).

²⁷²D. DOBBS, *supra* note 267, § 4.3, at 249.

²⁷³1 L. JONES, *supra* note 268, § 2, at 2 n.1 (Mr. Jones used the term "retain"); D. OVERTON, *supra* note 268, §§ 1-5 (Mr. Overton used both "detain" and "retain").

²⁷⁴D. DOBBS, *supra* note 267, § 4.3, at 250; cf. D. OVERTON, *supra* note 268, § 9 (where the author professes that "there can be no lien where the property is annihilated").

principle permits the lienholder whose lien attaches to a chattel that has suffered a reduction of value in the hands of the defendant to seek satisfaction for the full amount of the obligation by combining the action for discharge of the lien with an action at law for the difference in value.²⁷⁵

This aspect of the legal concept of liens becomes important in the context of section twelve because unless the section operates to diminish the obligation underlying the lien as well as the lien, no diminution of the lienholder's ultimate right of recovery will have been accomplished. If, for example, the lien is for \$10,000 worth of medical benefits conferred,²⁷⁶ and the recipient of those benefits is found to be 10% at "fault" in his tort action, the provider's lien is diminished by \$1,000, but unless section twelve is also construed to have diminished the obligation secured by the lien, the lienholder may seek a supplemental money judgment for that \$1,000.²⁷⁷

The different footing upon which lienholders' rights rest, in contrast to the rights of subrogated insurers, sets up a theoretical possibility that lienholders would ultimately be able to thwart the effect of section twelve and receive full reimbursement for the advances they have made to the injured party. In general terms, equitable liens are based upon and are intended to secure express or implied contractual rights between the parties. If the express terms of the contract or the implied understanding of the parties do not relate to the "fund" which is to be generated from the personal injury judgment of the recipient but to some other "fund," it would seem that neither the lien nor the underlying obligation "exists in respect to a claim for personal injuries or death"²⁷⁸ as required by section twelve. If such a case were to arise, and the lienholder asserted the secured rights independently from the recipient's tort action, the lienholder might argue that the case falls outside the contemplation of the provision.

Beyond this theoretical possibility, such a case does not appear likely under present Indiana law. No Indiana case has been found which has recognized an equitable lien under circumstances like those under discussion. Indiana does, however, confer a statutory lien in favor of hospitals providing medical services to injured parties, but since the lien attaches to "any judgment for personal injuries rendered in favor of any person [with some exceptions] . . . receiving treatment, care, and maintenance therein on account of said personal injuries received as a result of the negligence of any person or corporation,"²⁷⁹ the lien and

²⁷⁵D. DOBBS, *supra* note 267, § 4.3, at 250.

²⁷⁶Indiana Code section 32-8-26-1 for example, confers a lien upon hospitals having furnished the injured party with medical services.

²⁷⁷D. DOBBS, *supra* note 267, § 4.3, at 250.

²⁷⁸IND. CODE § 34-4-33-12.

²⁷⁹IND. CODE § 32-8-26-1 (1982).

underlying obligation would appear to satisfy the elements of section twelve.²⁸⁰

4. *Claims*.—If the word “claim” has independent significance in

²⁸⁰Section twelve limits a “lien or claim” that otherwise satisfies the elements of the provision. Logically, the lienholder could concede that the lien and the obligation asserted in a related contractual claim were subject to diminution and still contend that since the two remedies are not a unitary element, they should be serially diminished. To illustrate, assume advances of \$10,000 for which the statutory lien arises and that the plaintiff’s “fault” is assessed at 20%. This line of argument would assert that the lien would be diminished by 20%, leaving \$2,000 in the contract claim, which would then be reduced by 20% or \$400, allowing a total reimbursement of \$9,600. Surely the legislature did not intend lienholders and holders of subrogated rights to be treated differently. If that is true, the logic of the lienholder’s argument above compels a conclusion at odds with the enactment. The logic is enabled by the failure of the language in section twelve to actively and directly address what the section only apparently was designed to do—to treat the rights of lienholders and subrogated providers equally by reducing the injured party’s *obligation* to the holder of the right.

The design is apparent because the drafter equated subrogation rights and liens on the one hand and treated liens and claims as equivalencies on the other. The phrase “subrogation claim or other liens” is evidence of the equation of liens and subrogation claims, and the pregnant word is “other.” In ordinary usage, “other” sometimes denotes the noun following it as a more general class of things of which the noun preceding it is a member, as in the phrase, “apples or other fruit.” See Kirk, *Legal Drafting: Curing Unexpressive Language*, 3 TEX. TECH. L. REV. 23, 36 (1971) (quoted in R. DICKERSON, MATERIALS ON LEGAL DRAFTING 129-30 (1981)). Used as an adjective it may also mean one of a class that is left, as in “the only other apple you may have is on the tree,” or one that is different, as in “I don’t want that apple, I want the other one.” Only the drafter knows the precise semantic meaning of the term “other” in section twelve, but the first usage here seems closest to the syntactic arrangement of the phrase in the section. If that is true, the drafter must have thought of liens as a more general term sharing characteristics with subrogation rights. Professor Kirk explains that in statutory interpretation if “other” is used in a series it is actually construed as *limiting* the modified term to the characteristics of the preceding items even though the drafter’s intent may have been entirely the opposite. See *id.* While the two devices do have several aspects in common, liens are not just a more general class of legal devices, and the significance for the applicability of section twelve lies in their differences. Since nothing serves as security for the obligation which is the object of a subrogation right, and since liens may under some circumstances be combined with other remedies, a suggestion that the phrase “subrogation claims or other liens” means that subrogation rights are a member of the more general class of remedies called liens is clearly incorrect in the law. An analogous phrase in the same syntax as the one under discussion would be “apples and other oranges.” While this ascribed intent may be vulnerable to criticism from the standpoint of legal accuracy, it would nevertheless support the argument that liens and subrogation claims are intended alternative subjects to be similarly affected by the predicate clause of section twelve. Simply because the drafter thought of liens and subrogation claims as alike does not make them so, but it would indicate that the sense of the enactment is to treat the two devices, and, by implication, their underlying rights, equally.

The phrase “lien or claim,” simple as it may be, is even more troublesome. The phrase appears in the predicate clause of the section (“the lien or claim shall be diminished”) as well as the subject clause. Many semantic difficulties reside in the use of the term “or,” since it has an exclusive sense, as in the phrase “apples or oranges may be picked” (meaning apples may be picked or oranges may be picked, but not both) and an inclusive sense (when the same phrase means apples or oranges or both may be picked). R.

the subject and predicate clauses of section twelve,²⁸¹ the section may fairly be said to diminish appropriate claims against the injured party, regardless of whether the claim arises from or is associated with subrogation rights or rights secured by liens. While the intended operation of section twelve may be taken to be the same with respect to general claims as subrogation claims and liens, the same deficiency of indirect language is also present.

A comparison of section twelve language with the language of the general substantive sections of the Comparative Fault Act brings the indirectness of section twelve into high relief. The first substantive section of the Act provides: "In an action based on fault, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the

DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING*, § 6.2, at 76-78 (1964) [hereinafter cited as *FUNDAMENTALS OF LEGAL DRAFTING*]. Drafting convention has it that the inclusive sense is the meaning to be attached to the word in legislative interpretation, so it may be said that the phrase "lien or claim" means lien or claim or both. *Id.* at 77; R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 233 (1975). The term may also denote an interchangeability of the linked terms as equivalents, such as in the phrase "a cabin or cottage sits on the hill." *FUNDAMENTALS OF LEGAL DRAFTING*, *supra* § 6.2, at 76 n.6. Evidence that the drafters may have used the term in this third sense is illustrated by looking at the whole subject clause of section twelve: "a subrogation claim or other lien or claim." If the latter use of "claim" is not linked to "lien" as an equivalent term, the clause is rendered redundant since the general word "claim" could have made the subject clause complete without enumerating "subrogation claim." Removing the words "lien or" demonstrates this; the phrase would then be "subrogation claim or other claim"—the whole class of "claims" could be captured simply by using the unmodified term. The drafter has done just that in the predicate clause of the section, and no good reason for assuming an intended redundancy is apparent. If redundancy is to be avoided, then what appears to have been a three-item enumeration of (1) subrogation claim, (2) lien, and (3) claim, may be taken as a simple two item enumeration: (1) subrogation claim, and (2) the unitary concept of lien or claim.

The trouble with attempting to make sense of the clause in this line of analysis is that it sets up to a triple dilemma. In order to conclude that "lien or claim" is to be treated as a unitary concept so that a \$10,000 lien/claim will be reduced in the same amount as a \$10,000 subrogation right/claim, the statute must be taken to be in violation of sound drafting and interpretation principles. At the same time, if the unitary concept of lien/claim is taken to be intended by the phrase "lien or claim" in the subject clause, the same phrase in the predicate clause can be construed in a like manner and the first item in the two-item enumeration would disappear from the predicate clause. To reject this construction and assume that drafting convention has been followed and "or" means either lien or claim or both exposes the subject and predicate clause of section twelve to the logical argument that even if both the lien and the contractual claim are to be diminished, the statute does not say that they shall be diminished as if a single amount. By failing to directly state that the obligations secured by liens and asserted in claims against the injured party shall be diminished, section twelve may have struck wide of its intended mark.

²⁸¹See *supra* note 280 for discussion of the possibility that "claim" and "lien" may not be so independent.

claimant's contributory fault, but does not bar recovery except as provided in section 4 of this chapter.²⁸² The substantive section which states the "greater than 50%" rule provides in part that "the claimant is barred from recovery if his contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages."²⁸³ Throughout the Act, the injured party is referred to as "the claimant." In this context, the assertion that someone has caused an injury through fault together with the consequent demand for money damages for those tortious injuries constitutes a "claim." Consistent with the approach of section twelve, the apportionment effect of the Act might have been stated as a diminution or bar of a claim. The legislature chose, however, to express directly both the operation of the statute and the subject of that operation; the *amount awarded as compensatory damages* is reduced or the *recovery* is barred, leaving no doubt of the effect of those provisions and the subjects to be affected. It is unfortunate that similar specificity was not employed in section twelve.

In the case of claims, practicalities may again work to prevent serious problems from arising. So long as a claim satisfies the contemplated case of the statute,²⁸⁴ absent some vehicle besides a "claim" with which to assert the underlying obligation and demand payment, the provider seems compelled to accept the diminished value of the claim as final satisfaction. One definition of "claim" is "right of recovery."²⁸⁵ If section twelve is read to say that rights of recovery are diminished, all avenues of escape from the operation of the section would appear to be closed for claims.

However, the significance of another phrase in section twelve becomes important in connection with a claim. The claim must also "[exist] in respect to a claim for personal injuries or death."²⁸⁶ Absent that circumstance, the claim would be outside the subject of section twelve's diminution effect, even if the holder of the claim asserted it only after the injured party had received sufficient funds from a tort judgment to satisfy the claim. No case on point has been found in Indiana, but it is entirely plausible that an express or implied contractual claim for medical services and supplies conferred upon an injured party could

²⁸²IND. CODE § 34-4-33-3.

²⁸³*Id.* § 34-4-33-4(a), (b).

²⁸⁴The terms "case of the statute" refer to the generalized set of facts which occasion the operation of the statute, as contrasted with the common law attorney's notion of a "case" as a specific set of allegations comprising a dispute. See F. HORACK, CASES AND MATERIALS ON LEGISLATION 571 (2nd ed. 1954); Kennedy, *Legislative Bill Drafting*, 31 MINN. L. REV. 103, 111 (1946).

²⁸⁵BLACK'S LAW DICTIONARY 224 (rev. 5th ed. 1979). See *supra* note 264.

²⁸⁶IND. CODE § 34-4-33-12.

arise which could fairly be said to exist wholly independently of the injured party's tort action.²⁸⁷

Little legal difference lies between a physician who renders services to an injured party, a hospital that does so, or an insurer that pays for those services, in terms of the obligation of the injured party to reimburse the provider for the value of the services. Yet, nothing inherent in the implied agreement between the injured party and the physician suggests a necessary connection to or dependence upon some inchoate tort action that may or may not arise in the future between the injured party and the person who caused the injury. In contrast to the nature of liens and subrogation rights, which are in large part closely related if not dependent upon the personal injury action and the "fund" which is generated by judgment in that action, a claim *and* its underlying obligation in this context are independent of the adjustment of rights between the injured party and tortfeasor. Once again, the indirectness of section twelve's language may have failed to reach the true subject of the legal predicate of the enactment.

5. *Workers' Compensation Liens*.—Section twelve specifically excepts workers' compensation²⁸⁸ and occupational disease²⁸⁹ liens and subrogation rights from its operation.²⁹⁰ Liens and subrogation rights arising from workplace injuries and diseases²⁹¹ present special issues not present in other settings because the worker's employer may have been partially at fault in producing the disability.

As originally enacted, the Comparative Fault Act addressed neither the matter of how the employer's fault was to be treated in apportionment decisions, if at all, nor how the employer's lien and subrogation rights were to be affected by that apportionment.²⁹² As a result, difficult issues lurked in the Act concerning the worker's ability to obtain adequate compensation. Two features of tort litigation for workplace injuries under comparative fault combined to produce potential problems: (1) the exclusivity of workers' compensation as a remedy against the employer, and (2) the Act's requirement that jurors assess the "fault" of

²⁸⁷See, e.g., *Cotnam v. Wisdom*, 83 Ark. 601, 104 S.W. 164 (1907) (the court held that a physician was entitled to recover for the reasonable value of his services when conferred upon the victim of an accident). Cf. *In re Davis*, 132 Misc. 811, 231 N.Y.S. 4 (1928) (disagreeing with the *Cotnam* court on the issue of whether the jury could consider the obligor's ability to pay as a factor in determining reasonableness of the obligation).

²⁸⁸The statute conferring the lien and subrogation rights for benefits paid for accidental injuries is Indiana Code section 22-3-2-13 (1982).

²⁸⁹Liens and subrogation rights in the case of payments for occupational disease are created by Indiana Code section 22-3-7-36 (1982).

²⁹⁰IND. CODE § 34-4-33-12.

²⁹¹For the sake of brevity, both the workers' compensation and occupational disease provisions will be referred to solely as workers' compensation in the remainder of this discussion.

²⁹²See Act of Apr. 21, 1983, Pub. L. No. 317-1983, 1983 Ind. Acts 1930.

persons not named in the tort action. The exclusive remedy of the workers' compensation statutes prevents an injured worker from naming even a culpable employer as a defendant in a tort action against a third party for an injury suffered in the workplace.²⁹³ Under the original Comparative Fault Act, this did not foreclose the jury from assessing the "fault" of the nonpresent employer as a part of the "total fault" contributing to the injury.²⁹⁴ Consequently, a worker injured by the combined fault of the employer and a third party would have had to bear the economic burden of the employer's culpability since his recovery would be reduced in proportion to the nonparty employer's "fault." For example, if the worker's total damages before adjustment were \$100,000, the employer's "fault" was assessed at 15%, and the third party's "fault" was assessed at 85%, the worker's verdict would be for \$85,000 against the third party.

Furthermore, the statutory rights to reimbursement permit the employer to recover "the amount of compensation paid to the employee or dependents, plus the medical, surgical, hospital and nurses' services and supplies and burial expenses"²⁹⁵ paid to the employee, less the employer's share of litigation expenses. Under the Act's original language, if the employer had paid \$10,000 in such benefits and expenses, the worker's recovery would be reduced by that \$10,000 (less expenses) to discharge the employee's obligation to the employer and the right to future worker's compensation benefits would be extinguished.²⁹⁶ For his \$100,000 injury, the worker's net compensation resources would fall short of full recovery by approximately \$15,000.

The amended Act solves the problem by excluding employers from the "nonparty" classification,²⁹⁷ and by permitting the employer to obtain reimbursement undiminished by the worker's assessed "fault."²⁹⁸ Thus, in the hypothetical situation above, even though the worker's employer was at fault, the defendant named in the tort action is prohibited from asserting that fault as a partial defense. The defendant's "fault" would be assessed at 100% and the plaintiff's verdict would be for the full \$100,000. The employer would then be entitled to reimbursement of the \$10,000 workers' compensation benefits and medical expenses paid. Having received a total of \$110,000 in compensation resources but being required to disburse \$10,000 back to the employer, the worker's net compensation would equal full damages.

²⁹³IND. CODE §§ 22-3-2-6, 22-3-7-6.

²⁹⁴See Act of Apr. 21, 1983, Pub. L. No. 317-1983 Sec. 1, § 5, 1983 Ind. Acts 1930, 1931-32. (codified at IND. CODE § 34-4-33-5 (Supp. 1984)).

²⁹⁵IND. CODE §§ 22-3-2-13, 22-3-7-36.

²⁹⁶*Id.*

²⁹⁷Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2(a), 1984 Ind. Acts 1468, 1468-69 (amending IND. CODE § 34-4-33-2(a)).

²⁹⁸Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 7, § 12, 1984 Ind. Acts 1468, 1472-73 (adding IND. CODE § 34-4-33-12).

In the case of a worker partially at fault, the system works to prevent overcompensation. If, for example, a worker sustaining a \$100,000 injury had been found 15% at "fault," his verdict against the defendant in the tort action would be for \$85,000. If the employer had paid \$10,000 in workers' compensation benefits and his right to reimbursement was treated in the same way as other liens and claims under section twelve, the employer would be entitled to recover only \$8,500 (less expenses) and the worker's net compensation would be \$1,500 greater than he would be entitled to recover under the apportionment of fault principle.

From one perspective, this system seems overly protective of the interest of employers who have been partially at fault in bringing about the worker's injury. In a case where all three actors contribute some fault to the incident, for example, the only party who is not made to bear its ultimate share of economic responsibility for faulty conduct is the employer. From the perspective of the workers' compensation system, however, the effect may be justified as a matter of policy.

One policy justification is to avoid the difficult matter of meshing the nonfault system governing compensation for workplace injuries with the comparative fault system. If employers were to be made subject to suit in situations where third party defendants also contributed to the harm, for example, much of the delicate balance of interests obtained in the workers' compensation system would be lost, and employers' incentive to participate in the system would be reduced.²⁹⁹ Employers have been required to bear the direct economic burden of the workers' compensation system partially in return for immunity from tort liability to injured workers. If they were required to appear and defend in actions where third party defendants were allegedly responsible, employers could argue that, at least with respect to this class of cases, some of the efficiencies of the workers' compensation system would be lost at their expense. An incentive to bring third party actions naming employers as defendants might arise because workers' compensation benefits do not even pretend to be full compensation for the worker's injuries. These conflicting incentives would create a tension between the fault and nonfault systems which would not be healthy for either system.

²⁹⁹This is not to suggest that the workers' compensation system is dependent upon employer incentive. Participation is compulsory for qualified employers. IND. CODE §§ 22-3-2-2, 22-3-7-2 (1982). However, compulsory compliance does not produce full compliance. Workers' compensation statutes were recently amended to bolster enforcement powers and sanctions in response to increasing incidences of employers flaunting the statute's requirements for coverage. Act of Feb. 24, 1982, Pub. L. No. 135-1982, 1982 Ind. Acts 1034 (amending IND. CODE §§ 22-3-4-13, 22-3-7-34). Those measures may have solved some of the problems of nonparticipation; they are not at work in some employers' decisions about participation. Nor would those provisions relieve tensions that might build up which would produce pressure for comprehensive modification of the system should employers be made vulnerable to fault liability in some settings.

If the employer is excluded from the tort action but the employer's fault is nevertheless taken into account, the potential for either overcompensating or undercompensating the injured worker looms large. The benefits payable under the workers' compensation system are not determined by reference to fault, and the employer's proportion of "fault" in the tort action may not precisely match the amount of compensation paid under the workers' compensation benefit formulas and schedules. One illustration of overcompensation has already been given. On the other hand, if a worker suffering a \$100,000 injury received workers' compensation benefits and medical expenses totalling \$10,000 and the employer's "fault" was later assessed at 20%, *undercompensation* by approximately \$10,000 would result.

Another policy consideration favoring section twelve's exceptions relates to the principle of fairness in allocating the benefits and burdens of the system. Since the economic vitality of the workers' compensation system is dependent upon employers' contributions³⁰⁰ to the compensation pool, either through payment of insurance premiums or self-insurance, a policy based upon fairness might well justify excluding the employer from accountability for some incidents of faulty conduct. The probability that most employers will eventually be required to finance payment of compensation benefits and medical expenses in more instances where they are not at fault than where they are at fault might be viewed as an adequate quid pro quo for permitting the occasional faulty employer to escape accountability. The third party defendant does not have the same claim for equitable balancing of the financial impact of a workplace injury. The third party has not contributed at all to the compensation resources.³⁰¹ The worker, not having contributed to the compensation resource pool up to the point of injury, is in a weaker position than the employer for disavowing accountability in the ultimate allocation of

³⁰⁰Employees indirectly contribute to the economic balance of the system by foregoing full compensation for their injuries in return for the surer and more efficient payment of benefits. Since the issues addressed here arise only in the context of situations where the injured worker also has a third party defendant to look for compensation, the economic burden upon such workers is not implicated.

³⁰¹If fairness is of prime concern, the interests of the third party defendant who must ultimately bear the cost of the employer's fault must be carefully considered. Where the third party's fault is significantly less than the employer's but that defendant is made to bear 100% of the worker's damages, the issue is acute. Unfortunately, if such defendants are permitted to reduce their liability by forcing the worker to accept a verdict apportioned to the "fault" of the employer, the compensation function of the comparative fault system would be undermined. If they are permitted to reduce their liability by obtaining reimbursement from the employer in proportion to the employer's "fault," the nonfault basis of the workers' compensation system would be undermined. Given the worker's injury and the employer's contributions to the workers' compensation system, the equities favor the worker, the employer, and the third party defendant, in that order. If fairness follows equity, the Act has struck the correct balance.

compensation. He also has a choice whether to substitute tort compensation for workers' compensation,³⁰² and it is consistent with the fairness principle to require that a choice of the former releases the employer from financial burden. As between the worker and the third party defendant, even where both are at fault, the issue of which of them more fairly bears the financial burden of the employer's fault is easily answered in favor of the party who has been injured. If the third party has also been injured, the matter is much more complicated, but the injured third party's interest in compensation is not jeopardized by the operation of section twelve.³⁰³

When the injured worker chooses workers' compensation over suing the third party, the workers' compensation statutes confer upon employers the right to pursue reimbursement for benefits and expenses against the tortfeasor.³⁰⁴ In such a case, section twelve is not invoked and the

³⁰²IND. CODE §§ 22-3-2-13, 22-3-7-13.

³⁰³In such a case, the court should consider bifurcating the trial, treating the injured worker's action against the third party separately from the third party's action against the worker and the employer because while the employer may not be treated as a "nonparty" in the worker's suit against the third party, no such restriction is imposed in the third party's suit against the worker. Since keeping the employer out of the case in the third party's action while allowing the assessment of the employer's "fault" would put the burden of reduced recovery upon the injured third party, the third party should be permitted to name the employer as defendant. On the other hand, since bringing the employer into the worker's case would be contrary to and would thwart the objectives of section twelve's design, the worker should be permitted to keep the employer out of his case. Having the employer in the case for one party and out of the case for the other might prove to be overwhelming for the jury. Bifurcating the trial with careful guidance supplied to the jury would ease the difficulty. As an example of what might result, consider worker (*W*) with a \$100,000 injury and a third party (*3P*) with a similar injury. The employer (*E*) has paid *W* \$10,000 in benefits and expenses. Starting with trial one, *W*'s action, and assuming that *W*'s "fault" is assessed at 40%, *W*'s verdict would be for \$60,000 against *3P*. Assuming further that *W* reimburses *E* for the \$10,000, his net recovery is \$60,000. In trial two, *E* appears and defends, and *3P* is entitled to have *E*'s "fault" apportioned. Assuming an assessment is returned by the jury that *E* is 20% and *3P* is 40% at "fault," verdicts in favor of *3P* would then be entered against *W* for \$40,000 and against *E* for \$20,000, for a net recovery of \$60,000. It is much easier to describe such an outcome in the abstract than actually to try to bring it about, of course, but it is entirely plausible that both injured parties can recover fully, commensurate with comparative fault principles. A court may want to consider conducting the trial in the order illustrated above, with the jury first considering the worker's "fault," because having the jury assess the employer's and the third party's shares of "fault" first may inject an element of prejudice into the worker's segment of the case which sections one and twelve try to avoid. Because each case will present different requirements for avoiding such prejudicial carryover from one determination to the other, the court should consider with care which segment to try first. It should be noted that set-off between the parties is assumed to be no problem in this illustration. It would be an issue, however, and the issue in a more general context is considered in a separate section of this article. See *infra* notes 449-64.

³⁰⁴IND. CODE §§ 22-3-2-13, 22-3-7-36.

subrogated employer should be subject to any defense which could be raised by the tortfeasor against the worker's action.³⁰⁵ That would mean that the *worker's* fault could be asserted as a "nonparty" defense, but it is not clear that the *employer's* fault could be asserted. If the employer "stands in the shoes" of the worker and the action is viewed as no more than a derivative action, logic would compel the conclusion that since the third party could not assert the employer's fault against the worker, that defense should be excluded in the employer's action. On the other hand, viewing the employer as a substituted real party in interest where the interests of the worker are not actually at stake in the action, because of the limited nature of the reimbursement remedy sought, would compel a different conclusion. Since the worker's action is not being asserted, this point of view demands that the third party should be able to raise the employer's own fault as a defense.

Should the courts diminish the employer's reimbursement remedy against the tortfeasor, they should carefully consider whether it is good policy to have a system which treats employers' rights to reimbursement differently depending on whether the worker or the employer asserts the claim. If an employer is entitled to full reimbursement when the worker asserts his tort action against the third party, but is entitled only to diminished reimbursement when he presses his subrogation claims independently, economic forces which have not figured in the system before come into play and should be given close scrutiny. The courts considering the issue should take into account whether the economics of full versus partial reimbursement would be of sufficient magnitude to induce employers in cases of this nature to encourage their workers to forego certain workers' compensation benefits for the less certain tort recovery. It would seem that the greater the fault contributed by the employer in producing the injury, the greater the inducement to avoid asserting a reimbursement claim subject to a fault defense.

III. COMPARATIVE FAULT AND ASSUMED/INCURRED RISK

A. *Introduction and Background*

The Indiana Act's definition of "fault" includes an "unreasonable assumption of risk not constituting an enforceable express consent" and "incurred risk." As will be seen in this discussion, it is not entirely clear what the General Assembly intended by its choice of language, but it is at least certain that in some circumstances where the common law would have barred recovery, assumption of risk and incurred risk are to be treated as comparative "fault" and the damages are to be apportioned. Dean Prosser has said that the doctrine of assumption of risk

³⁰⁵See 16 COUCH ON INSURANCE 2D, *supra* note 244, § 61:212.

has been a subject of much controversy, and has been surrounded by much confusion because "assumption of risk" has been used by the courts in several different senses, which have been lumped together under the one name, usually without realizing that any differences exist, and certainly with no effort to make them clear.³⁰⁶

Within the limited scope of this Article no attempt will be made to unravel the confusion, even assuming that it would be possible to do so. But some excursion into the murky depths of this area of the law must be made in order to appreciate how the Comparative Fault Act might operate in appropriate cases, and to raise some of the issues which the legislature's choice of language presents.

As a starting point, some description of the several senses of assumed and incurred risk may be helpful. Part of the confusion about assumption of risk resides in the facts that the defense applies to a wide spectrum of plaintiffs' conduct and, depending upon the kind of conduct involved, operates to relieve the defendant of liability in significantly different ways. The complexity inherent in the several theoretical and practical aspects of the defense has made it necessary to employ a sort of shorthand terminology for easy reference to these different aspects. A brief description of the concepts behind the shorthand terms, such as "primary" and "secondary" assumption of risk, will be set out here to facilitate later discussion. "Assumption of risk," as a general proposition, pertains to the defensive theory that a plaintiff who knew and appreciated a risk of injury to himself, and who voluntarily encountered that risk, should not be heard to complain that the defendant should be answerable for any injuries resulting from the forces which created that risk.³⁰⁷ When successfully employed, the defense totally bars a plaintiff's recovery. In some jurisdictions, like Indiana, the phrase "assumption of risk" pertains only to cases in which there has been some contractual relationship between the parties. The defense is called "incurred risk" when no contractual relationship is present. Indiana case law is not clear on the point, but it appears that the defenses are identical in all other respects³⁰⁸ and the discussion here will frequently refer to them collectively as "assumption of risk defenses." In a case where a plaintiff affirmatively states his intention to take on the risk as part of his responsibility, the

³⁰⁶W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* § 68, at 439 (4th ed. 1971) (footnotes omitted).

³⁰⁷*See generally*, 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 21.1, at 1162 *passim* (1956); W. PROSSER, *supra* note 306, § 68 *passim*.

³⁰⁸The Indiana Court of Appeals has presumed, without deciding, that the two defenses are essentially identical. *Kroger Co. v. Haun*, 177 Ind. App. 403, 408 n.2, 379 N.E.2d 1004, 1008 n.2 (1978).

defense is spoken of as an "express" assumption of risk.³⁰⁹ Where no affirmative conduct can be taken as an expression of an agreement to assume the risk, a plaintiff nevertheless may have exhibited conduct from which the courts may infer that agreement. In such a case, a plaintiff will be said to have "impliedly" assumed the risk.³¹⁰

The defenses have also been employed in other senses. Professors Harper and James have developed a classification of assumption of risk focusing upon the relationship between the plaintiff's and the defendant's conduct. If, in advance of the defendant's conduct, the plaintiff did something to relieve the defendant of a duty to protect the plaintiff from the risk and took on the responsibility for possible injury from that risk, courts adhering to Harper and James' classification would say that the plaintiff assumed the risk in the "primary" sense.³¹¹ In its "secondary" sense, assumption of risk means that the defendant has already negligently set an injurious force in motion, and the plaintiff accepts the risks attendant upon that force. Harper and James assert that the assumption of risk bar operates in "secondary" assumed risk cases only where the plaintiff's acceptance of the risk was unreasonable as tested by the circumstances. They consider this segment of the defense to be a "form of contributory negligence."³¹²

This idea of an "overlap" between the assumption of risk defenses and contributory negligence has been another source of confusion and discontent in the case law, as Dean Prosser's comment has pointed out. In the abstract, it may be presumed that there are some risks of harm that the reasonably prudent person would not voluntarily take. In every risk-encountering act the theoretical *possibility* therefore exists that the actor could be found to have acted contrary to the reasonably prudent person standard. If that act culminated in injury to the actor, the claim against the person who created or maintained the risk is subject to a defensive plea that the actor negligently contributed to his own injury by unreasonably assuming the risk. In such a case, it makes no difference in a negligence system whether the action is barred for the assumption of the risk or contributory negligence. The matter of a *reasonably* assumed risk presents much more difficult pragmatic and theoretical issues. If the Harper and James analysis is adhered to, and the reasonable assumption of risk is of the "secondary" type, the plaintiff's action will not be barred.³¹³ The logic supporting this conclusion is that since

³⁰⁹2 F. HARPER & F. JAMES, *supra* note 307, § 21.6, at 1184-89; W. PROSSER, *supra* note 306, § 68, at 442-45.

³¹⁰2 F. HARPER & F. JAMES, *supra* note 307, § 21.6, at 1184-85; W. PROSSER, *supra* note 306, § 68, at 445-47.

³¹¹2 F. HARPER & F. JAMES, *supra* note 307, § 21.1, at 1162-68.

³¹²*Id.* at 1162.

³¹³*Meistrich v. Casino Arena Attractions*, 31 N.J. 44, 155 A.2d 90 (1959) is a leading case. See also *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977); *Parker v. Redden*, 421 S.W.2d 586 (Ky. 1967); *Felger v. Anderson*, 375 Mich. 23, 133 N.W.2d 136 (1965);

“secondary” assumption of risk is a form of contributory negligence, to reasonably assume a risk is to act in accordance with the standard of care. If, however, the risk had been reasonably assumed in the “primary” sense, the plaintiff’s action would nevertheless be barred on the logic that the only relevant inquiry is whether the plaintiff’s act had relieved the defendant of the duty of care toward the plaintiff. Since the plaintiff’s fault in assuming the risk is not the basis for his accountability, the reasonableness of that assumption has no bearing upon the applicability of the defense. Furthermore, it is theoretically possible to acknowledge an “overlap” and pragmatic similarity between the assumed risk and contributory negligence defenses without accepting Harper and James’ idea of an interdependent mixture of the two. If the assumed risk defense in all of its various senses is considered to be a defense not based upon fault, the reasonableness of the plaintiff’s encounter with and acceptance of the risk is irrelevant. Under this nonfault view, a plaintiff would be barred for having taken the risk upon himself regardless of whether he had acted in accordance with the standard of ordinary care.

When the traditional negligence system is abandoned in favor of a comparative fault system and the latter system purports to incorporate the assumed risk defenses, some important issues about how those defenses are to operate in the new system are immediately suggested:

- (1) Since fault is the watchword in the comparative system, how are the nonfault aspects of the assumption of risk defenses to be treated?
 - (a) Is the adoption of comparative fault to be considered a total merger of the assumption of risk defenses with fault defenses by either:
 - (i) somehow translating the nonfault aspects of the defenses into “fault” for comparative purposes, or
 - (ii) abolishing all nonfault senses of the defenses?
 - (b) Or, are the nonfault aspects of the defenses to remain intact and outside the comparative system as complete bars to plaintiffs’ action?
- (2) How much can and should the common law concepts of the assumption of risk defenses affect the answer to the first issue and its subissues?

These issues are the focus of this part of the Article.

As will be seen, obtaining answers to these issues is not simply a

Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1979); Bolduc v. Crain, 104 N.H. 163, 181 A.2d 641 (1962); Sandford v. Chevrolet Div. of General Motors, 292 Or. 590, 642 P.2d 624 (1982) (excellent general discussion where comparative negligence statute abolished “implied” assumption of risk.).

matter of reading the words of the Comparative Fault Act. Two background elements figure importantly in the interpretation of that language: (1) the General Assembly's heavy reliance upon the Uniform Comparative Fault Act's definition of "fault," and (2) the Indiana case law development of the assumption of risk defenses. Both of those background elements will be examined in detail. That examination will reveal some conceptual gaps between comparative fault and the assumption of risk defenses which were not closed by the General Assembly.

The language chosen by the General Assembly is susceptible of conflicting interpretations because of its conceptual gaps. This discussion will explore those interpretations and the possible theoretical, functional, and policy-oriented issues they raise, to show that the legislature has failed to speak with sufficient precision to ensure trouble-free application of the apportionment principle in tort litigation involving assumption of risk defenses.

B. "Reasonable" and "Unreasonable" Assumption of Risk Under the Uniform Act

To fully appreciate the effect the Indiana Act imposes upon assumption of risk defenses, it is helpful to consider the approach of the Commissioners on Uniform State Laws. Because the Uniform Act is simpler and is accompanied by explanatory commentary, it can provide an anchoring point for the consideration of the more complex issues the Indiana Act poses.

The Uniform Act, like the Indiana Act, includes in its definition of "fault" the acts of a claimant amounting to an "unreasonable assumption of risk not constituting an enforceable express consent." Risk-assuming conduct becomes "faulty" conduct by virtue of the modifier "unreasonable." By implication, a plaintiff would not be subject to apportionment of fault so long as his assumption of risk was not "unreasonable." The definition fails to address, and thereby fails to incorporate into comparative fault, conduct in which the plaintiff encountered and accepted a known and appreciated risk, and did so under circumstances a trier of fact would find reasonable. Only that part of assumption of risk that "overlaps" with contributory negligence triggers apportionment, and the commissioners' commentary accompanying the section clearly shows that the definition was intended to operate that way.³¹⁴

The Uniform Act's "unreasonable assumption of risk" in essence incorporates into comparative fault the "secondary" sense of that defense as articulated by Professors Harper and James. That is, the plaintiff

³¹⁴UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 35, 37-38 (Supp. 1984) [hereinafter cited as UNIFORM ACT].

will be subject to a reduction of damages where he has encountered a risk associated with the defendant's activity, and ran that risk in a manner which, in the view of the circumstances, a trier of fact would deem below the standard of reasonableness. In the ordinary case, the assumption of risk elements of knowledge, appreciation, and voluntary encounter of the risk are usually so inextricably mixed with and part of the plaintiff's substandard conduct that practical separation of the plaintiff's assumption of risk and contributory negligence is impossible. In order to attach legal significance to the risk-assuming character of the plaintiff's conduct, it is meaningful in such circumstances to speak of the defense only by shifting from an evaluation of the subjective presence of the essential elements to an evaluation which objectively attaches those elements to the circumstances. The case is likely to present a plaintiff who has not subjectively known or appreciated the risk. If that is true, naturally he will not have expressed an intention to take responsibility for the risk. The legal evaluation of his conduct necessarily concentrates upon the deed which brings him into injurious involvement with the risk. It may be that only by acutely distorting the meaning of the term "responsibility" can such a plaintiff's behavior be said to have evidenced an intent to be responsible for anything, much less a risk of injury. In such a case, the basis of accountability in assumption of risk can be satisfied only by evaluating the plaintiff's behavior against the standard of reasonableness. The conclusions of such an evaluation might be that the plaintiff's conduct was so unreasonable that even though he did not subjectively know or appreciate the risk, he should have; that even though he did not subjectively agree to accept the consequences he should not, as a matter of objective policy, be heard to say that he did not.

This objective theory of "unreasonable" ("secondary") assumption of risk³¹⁵ is so dependent upon the reasonable person standard for establishing the general elements of the defense that the defendant pragmatically cannot satisfy the predicates of the defense without referring to the faultiness of the plaintiff's acts. The close, dependent relationship between "unreasonable" assumption of risk and fault is demonstrated in the commissioners' official commentary to the Uniform Act, where the commissioners state that "unreasonable assumption of risk . . . does not include . . . reasonable assumption of risk (which is not fault and should not have the effect of barring recovery)."³¹⁶ Experience with

³¹⁵It is also "implied" assumption of risk, but for the sake of clarity, that sense of the defense is ignored here. It is addressed in the discussion accompanying notes 330-38, *infra*.

³¹⁶UNIFORM ACT, *supra* note 314, at 38. The specific significance of this portion of the commissioners' comments is discussed in more detail later in this discussion in the text accompanying note 338, *infra*.

cases of this sort has led some courts to blend "secondary" assumption of risk into a unitary contributory negligence defense.³¹⁷

If this unitary concept of the two defenses is what the drafters of the Uniform and Indiana Acts contemplated, then it is not only sensible to permit a defendant to invoke the apportionment principle when a plaintiff "unreasonably" assumes the risk, it is sensible to deny apportionment when a plaintiff is reasonable. Since, in circumstances calling for the objective theory, the elements of assumed risk are so closely tied to the evaluation of the social acceptability of a plaintiff's actions, then when those actions are deemed reasonable by the trier of fact it can be said that the defendant has failed to satisfy the threshold of "fault" necessary to trigger the apportionment principle. Professors Harper and James might say that to be accurate, it should not be said that the plaintiff has "reasonably assumed the risk," but rather that because the plaintiff has acted reasonably, he has *not assumed* the risk.³¹⁸

However, cases where the plaintiff has acted reasonably in the face of a known danger and in which the courts have nevertheless held that the plaintiff may not recover for having assumed the risk present some difficulty in reconciling practice with theory.³¹⁹ If these cases represent a segment of "reasonable" assumption of risk not affected by the definition of comparative "fault" here being examined, they pose the possible dilemma of some plaintiffs being totally barred for reasonable conduct while others are able to benefit from apportionment if their acts were "unreasonable." This proposition may cause some to recoil if it is thought to mean that a wrongdoer may escape liability altogether if her victim was acting in a socially acceptable manner regarding the risks posed by the defendant's socially unacceptable behavior.

The dilemma is escaped by employing the "primary" sense of assumption of risk. Professors Harper and James explain the meaning of this sense of the defense as "only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk. In such a case plaintiff may not recover for his injury even though he was quite reasonable in encountering the risk that caused it."³²⁰ If this concept is permitted to control and the defendant successfully shows that the plaintiff's knowing, voluntary acceptance of the risk has the effect of relieving the defendant of a duty, the fundamental principle of the defense will have been discharged. The plaintiff will have taken the responsibility for the potential injury and none remains with the defendant. Here, the legal significance of the distinctions residing in the

³¹⁷See authorities cited *supra* note 313.

³¹⁸See 2 F. HARPER & F. JAMES, *supra* note 307, § 21.1, at 1162, and § 21.8, at 1191.

³¹⁹See 2 F. HARPER & F. JAMES, *supra* note 307, § 21.1 at 1163-64 for cases of this sort, and the authorities cited at 1162 n.2. W. PROSSER, *supra* note 306, at 440 n.18 cites several others.

³²⁰2 F. HARPER & F. JAMES, *supra* note 307, § 21.1, at 1162 (footnote omitted).

terms "secondary" and "primary" become extremely important for ascertaining the ultimate place the assumption of risk defenses will occupy in a comparative fault system. In "secondary" assumption of risk, the plaintiff's conduct, like the defendant's, is socially unacceptable, and all of the same considerations which arise in a contributory negligence setting concerning the propriety of putting the entire burden of the injury upon the plaintiff are implicated. In a "primary" assumption of risk case, however, the fault basis for imposing liability disappears from the case altogether. Prosser explains that the plaintiff's cause of action fails under such circumstances "because as to him the defendant's conduct is not a legal wrong."³²¹ In such a case, the reasonableness of the risk and the reasonableness of the plaintiff's conduct in relation to it have no bearing upon the issue of accountability for the injury. The plaintiff may well have acted in a socially acceptable manner, but if, in so doing, he has removed responsibility from the realm of the defendant's duty and placed it entirely within his own control, he no longer has a claim against the defendant. It does not, as might appear from superficial analysis, involve a guilty defendant escaping liability to a "reasonable" plaintiff. Unless the statute or decision adopting comparative fault specifically transforms the assumption of risk defenses into something different from the concepts just developed, "primary" assumption of risk should have the same effect under a comparative fault system as under the traditional contributory negligence system.

The comments accompanying the Uniform Act's definition indicate that the commissioners did not intend to modify "primary" assumption of risk to permit that defense to invoke the apportionment principle. In attempting to explain what was meant by "unreasonable assumption of risk," the commissioners spelled out some ideas about what the defense did *not* include, one of which was "a lack of violation of duty by the defendant (as in the failure of a landowner to warn a licensee of a patent danger on the premises)."³²² The parenthetical illustration is one employed by Harper and James in their explication of the theory.³²³ The trouble with the illustration is that it relates the simplest possible circumstance: where at the outset the risk is not within the scope of defendant's duty to plaintiff. A case which more significantly involves the operation of the principle is where the defendant owes a duty of care toward the plaintiff and the risk is initially within the scope of that duty, but the plaintiff's actions remove it from that scope. Prosser cites *Hunn v. Windsor Hotel Co.*,³²⁴ a good example in which the plaintiff,

³²¹W. PROSSER, *supra* note 306, § 68, at 440.

³²²UNIFORM ACT, *supra* note 314, at 38.

³²³2 F. HARPER & F. JAMES, *supra* note 307, § 21.1, at 1164, and § 21.2, at 1168.

³²⁴119 W. Va. 215, 193 S.E. 57 (1937). See W. PROSSER, *supra* note 306, § 68, at 446 n.71.

an invitee of the defendant, was injured when she stepped on a plank the defendant had placed on the stairs to hold down a tread that was being glued to the stairs. Plaintiff said she knew the plank was dangerous because she had climbed the stairs earlier and thought the plank might move. Coming down, she stepped on it anyway, it moved, and she fell. The court denied recovery, despite its recognition that the facts suggested no negligence on her part, because she had assumed the risk.³²⁵ The court did not employ the term "primary assumption of risk," nor did it express the view that the defendant was relieved of his duty. Yet, the principle behind the assumption of risk defense clearly explains the result. The defendant owed a duty of care to keep the premises safe and to warn of known or discoverable dangerous conditions. However, that duty is relieved if the plaintiff otherwise knows of the danger, or if it is obvious.³²⁶ Here, the obviousness of the danger was in doubt, but the plaintiff testified that she knew about it. Having run the risk of injury resulting from that danger, responsibility for the injury shifted from the defendant to the plaintiff. The commissioners' commentary clearly indicates that "unreasonable" assumption of risk does not include "primary" assumption of risk, and that facts similar to *Hunn* would result in a total bar of the plaintiff's action.

The remainder of the definition and the commentary, however, demonstrate that the intent of the commissioners is not at all clear concerning the effect of comparative fault upon assumed risk defenses. According to the definition, and a comment which essentially repeats the phrase, the apportionment principle is not triggered by "a valid and enforceable express consent."³²⁷ Although it may appear at first to be a concept misplaced in negligence law, the principle of consent can be useful in appreciating the operation of assumption of risk defenses.³²⁸ A look at consent properly shifts the focus of analysis of the defense away from fault by permitting evaluation of the plaintiff's actions without reference to whether those actions were "reasonable" or not. This fundamental operation of consent can easily be seen in the more customary setting of liability for intentional conduct. When a plaintiff consents to an intentional invasion of his interests, tort law is not concerned with whether his consent is fault-ridden. The law of consent has to do only with whether the plaintiff has knowingly permitted the invasion and has agreed to bear the consequences. If he has, the defendant's conduct is not faulty because she was privileged to act in the

³²⁵119 W. Va. at 219, 193 S.E. at 58.

³²⁶See generally 2 F. HARPER & F. JAMES, *supra* note 307, § 21.2, at 1168-69; W. PROSSER, *supra* note 306, § 68, at 446; RESTATEMENT (SECOND) OF TORTS §§ 343, 343A, 496C (1965).

³²⁷UNIFORM ACT, *supra* note 314, § 1(b), at 36; *id.* comments at 37-38.

³²⁸See generally W. PROSSER, *supra* note 306, § 68, at 439-40; H. STREET, *THE LAW OF TORTS* 170-72 (1955).

invasionary manner by virtue of the plaintiff's consent. The operation of the assumed risk version of consent is similar to consent in an intentional tort setting.³²⁹ The important difference is that in assumption of risk cases, the object of the consent is the risk, not the invasion.

Because the object of the consent in the negligence setting is the risk, and because the defense may be applied when the plaintiff's actions show that he has only impliedly taken on the risk, the potential exists for a great deal of confusion in the law dealing with situations where plaintiffs have given no affirmative consent. In his treatise, Prosser attributes the confusion to a failure to distinguish between voluntary acts constituting consent to the risk and other voluntary encounters with perceived dangers which do not amount to the requisite consent.³³⁰ However, since it is more than apparent that this distinction is the ultimate question to be decided, the confusion must stem from the application of the consent principle to a given set of facts rather than residing in the result.³³¹ Prosser's favorite example illustrates the difficulty well: the person who jaywalks into a busy street. Asserting that such a person "certainly does not manifest consent that they [the drivers] shall use no care and run him down,"³³² Prosser concluded that the person's actions were "certainly contributory negligence . . . not assumption of risk."³³³ The difficulty lies in the necessity of satisfying the consent principle only, if at all, by applying the "implied" sense of assumption of risk, coupled with Prosser's own confusion regarding the object of the consent. As Prosser observed,³³⁴ to say that the jaywalker

³²⁹See W. PROSSER, *supra* note 306, § 68, at 440.

³³⁰W. PROSSER, *supra* note 306, § 68, at 445.

³³¹Prosser himself was a victim of the very confusion he lamented. He recognized that the object of consent in assumed risk is different from that of consent to intentional torts in an introductory statement: "The situation is . . . the same as where the plaintiff consents to what would otherwise be an intentional tort, except that the consent is to run the risk of unintended injury, to take a chance, rather than a matter of the greater certainty of intended harm." *Id.* at 440. But deeper in his treatment of the topic it becomes apparent that he failed to consistently adhere to that distinction as his discussion progressed. The statement quoted here appears in connection with his attempt to lay out his own classification of assumed risk defenses, which conforms roughly to Harper and James' "primary-secondary" classification. Unfortunately, in the course of describing his concept of the classes, he speaks of the consent as referring at different times to the risk, to the defendant's negligence, and "to relieve defendant of the duty," without acknowledging the changes. *Id.* As the discussion in the text demonstrates, it is a very difficult proposition to accept at a common sense level that people accept and consent to others being negligent toward them. Assumption of risk operates to relieve defendant of a duty only if plaintiff knows, appreciates, and accepts the risk within the scope of that duty. Prosser's treatment illustrates the limited usefulness of the consent concept as an analytical tool. For the most part, "consent to the risk" is ultimately just another way of saying "assumption of the risk."

³³²*Id.* at 445, 450.

³³³*Id.* at 450.

³³⁴*Id.* at 445.

consented to the negligent invasion of his person does not conform to common sense. The observation is likely to be valid in the bulk of "implied" assumed risk cases. The plaintiff's attitudes and intentions concerning the drivers' actions in the jaywalking case are likely to be the same as they would be if he were crossing with the light in the crosswalk. He still expects those drivers to exercise care respecting pedestrians, but if it is remembered that the object of consent in assumed risk is the *risk* rather than the invasion, it does not distort common sense to conclude that the plaintiff has taken the risk upon himself. Applying that common sense to the facts does require the evaluator to shun the subjective elements of the assumed risk defense in favor of an objective test of the plaintiff's conduct. In the crosswalk example the plaintiff leaves the risk where he found it, within the scope of the drivers' duty. His attitude and intentions about the drivers' duty are likely to be the same as the jaywalker's—neither actually consents to an invasion of his bodily integrity by the faulty conduct of the drivers. But common sense, including notions of personal responsibility, engenders a strong impulse to hold the jaywalking plaintiff accountable. It may be possible to hold him accountable only by focusing upon his objective behavior rather than his subjective intention, concluding that he took the risk of injury upon himself and manifested his intention to be responsible for that injury if it should occur.

The key is the necessity to apply the objective theory of "implied" assumption of risk. The plaintiff probably has not, in a truly voluntary exercise of intellect, decided to accept the consequences of the risk, but he has acted in a way which society demands be undertaken only by those who have accepted that responsibility. The plaintiff may not have agreed to accept the risk, but society will not hear his complaint that he did not. As with nearly all impositions of objective standards to a person's frame of mind, a certain uneasiness about the conclusions reached accompanies the application of those standards. Prosser indirectly expressed that uneasiness through his efforts to characterize the example as "contributory negligence, pure and simple."³³⁵ That it is not, and never will be. The plaintiff may well have been unreasonable in stepping into the street. If he was, our negligence-dominated system of tort law may more comfortably apply its objective standards to the plaintiff's actions to impose accountability. Yet he may not have been unreasonable. If the benefit he sought by crossing the street outweighed the risk, the more comfortable contributory negligence basis of accountability disappears. What is left is assumption of risk, not so pure, not so simple, reasonably assumed, but assumed nevertheless.

In such a circumstance, considerations of fairness strain to pose the questions: Why should a wrongdoer escape liability to one who reasonably and only impliedly assumed the risk? In this "secondary" sense, the

³³⁵*Id.*

defense is in the nature of the ancient pleading of excuse.³³⁶ The defendant is in effect arguing, "I confess I breached my duty to the plaintiff, but the plaintiff acted as if he chose to accept responsibility for the injury, and my actions or omissions should be excused." Nevertheless, there are excuses and there are excuses. When the plaintiff has been engaged in no wrongdoing himself, the excuse of "implied, secondary" assumption of risk seems weak in our fault-dominated system of liability. The Uniform Comparative Fault Act attempts to relieve the tensions produced by mixing the nonfault basis of assumption of risk with the fault basis of negligence by permitting the fact finder to conclude that such a plaintiff is not at "fault."

Yet the Uniform Act's definition is confined to "implied" assumption of risk cases. If the plaintiff's assumption of the risk "constitut[es] an enforceable express consent," the apportionment feature of the Act is not invoked. In effect, the definitional phrase addresses the problem of attaching the relatively drastic legal effect of a complete bar to the plaintiff's actions on a purely objective foundation. By excluding from the Act situations where the plaintiff has clearly and affirmatively taken the responsibility for the risk of injury, the commissioners have permitted the total bar to operate only where the plaintiff's exercise of choice is a matter of concrete fact provable by evidence which expresses the plaintiff's state of mind. Where elements of knowledge, appreciation, and voluntariness are dependent upon inferences to be drawn from circumstances, the commissioners have permitted the fact finder to adjust the right of recovery by applying the apportionment principle, and even then only when those circumstances portray unreasonable conduct.

Problems in applying the Act's definition might arise in certain cases. Consider the earlier fact situation of the invitee who stepped on the plank on the stairs knowing the plank was dangerous. The plaintiff's actions might well have been objectively unreasonable, and consent to the risk, as is usually the case, was not expressed. Yet, even though it seems that the definition of "fault" would apply, it should not. The plaintiff's actions in a "primary" assumption of risk case have the effect of relieving the defendant of a duty. The giving of the consent may have been above or below the standard of reasonableness, but that quality of the consent is irrelevant. The roots of assumption of risk in the maxim *volenti non fit injuria* are strongest in the "primary" sense of the defense. The defense is here in the nature of justification, and if proved defeats the plaintiff's prima facie case.³³⁷ The apportionment

³³⁶See Fletcher, *Fairness and Utility in Tort Law*, 85 HARV. L. REV. 537, 558-60 (1972). See generally 2 F. HARPER & F. JAMES, *supra*, note 307, § 21.1, at 1162 and authorities cited therein.

³³⁷Here defendant argues in effect, "I am not liable to plaintiff because plaintiff relieved me of responsibility for managing or eliminating the risk. My acts (or omissions) were thereby justified and plaintiff has failed to show that I was at fault." See generally authorities cited *supra* note 336.

principle should not be applicable because the plaintiff has not established a foundation of liability upon which to rest a right to adjustment of damages. There is, literally, no fault to be compared.

The commissioners attempted to address the "primary" assumption of risk situation in the commentary by stating that "unreasonable assumption of risk" does not include "a lack of a violation of a duty by the defendant." This commentary, if permitted to guide the courts in the application of the Indiana Act, will help avoid the potential for error in requiring apportionment in a "primary" assumption of risk case.

Even so, the possibility for confusion still lurks in the third commissioners' comment to the assumption of risk phrase. That comment says that "unreasonable assumption of risk . . . does not include . . . reasonable assumption of risk (which is not fault and should not have the effect of barring recovery)."³³⁸ Removed from the context of the other comments and given broad applicability, the comment might be taken to mean that all but "implied, secondary, unreasonable" assumption of risk is abolished as a defense. As the foregoing discussion has demonstrated, there is no neat separation of the various senses of the assumption of risk defense. Both "primary" and "secondary" assumption of risk may be "express" or "implied." In any setting, the consent to the risk may be "reasonable" or "unreasonable." The Uniform Act's definition of "fault" is operable only in the "implied, secondary, unreasonable" segment of cases, and the full set of commissioners' comments so demonstrate. The third comment just quoted should be taken to apply only to the "implied, secondary, reasonable" situation, and to mean only that the defendant should not be entitled to a reduction of damages in that context.

One difficulty attorneys and judges seeking to apply the Indiana Act are certain to experience is that there is no official commentary accompanying that Act. Since the Indiana Act borrows so heavily from the Uniform Act in many respects, it may be argued that the Uniform Act's commentary guided the General Assembly, and an adoption of the substantive part of the Uniform Act is tantamount to adopting the commentary. On the other hand, it can be forcefully argued that the comments limiting the general language of the definition of "fault" do not control the Indiana Act's definition. That argument finds support in the fact that the legislature did not adopt the Uniform Act verbatim. Since the Uniform Act's commentary presumes a "pure" comparative fault system, any presumption that the General Assembly adopted the commentary along with the substantive language must be tested with care, especially when we cannot truly know whether the legislature was even aware of the commentary. It is abundantly clear from a complete

³³⁸UNIFORM ACT, *supra* note 314, at 38.

reading of the commentary, however, that no modification of the definition of "fault" for those jurisdictions wishing to adopt something less than a "pure" system was considered necessary, or even advisable, by the commissioners.³³⁹ To construe the Indiana Act to have gone beyond the Uniform Act to abolish an important common law defense on the basis of the simple phrase "unreasonable assumption of risk not constituting an enforceable express consent"³⁴⁰ is not compelled by the phrase itself. To bolster that construction with an argument that the *absence* of official clarifying commentary compels it puts a weak presumption upon a foundation that is weaker still.

C. The Indiana Act's Definition

1. *General Issues.*—Not only does the Indiana Act contain the Uniform Act's "unreasonable assumption of risk" language and the difficulties associated with that phrase, it has added the words "incurred risk" to the definition of fault.³⁴¹ Dean Prosser has asserted that the words "incurred risk" represent simply another "invented name" for assumed risk in those jurisdictions, such as Indiana, where assumed risk is the term which applies when the parties stand in some relation of contract, and incurred risk applies to all other cases.³⁴² He has said further that "[t]his appears to be a distinction without a difference."³⁴³ If he was correct in respect to Indiana law, the ramifications for comparative fault in Indiana can be quite significant, since the words "incurred risk" are bare of the modifying phrases accompanying "assumption of risk." The Act will require that plaintiffs who incur a risk be treated differently than those who have assumed the risk, and unless some differences between the defenses exists in the common law which would justify the difference in treatment under comparative fault, the Act may need to be amended to correct the disparity. Some exploration of Indiana case law is therefore necessary in order to discover what the inclusion of "incurred risk" without the qualifying words means.

2. *The Background of Indiana Case Law.*—The presence or absence of a contractual relationship between the parties is of significance in Indiana on the question of whether a plaintiff "assumed" the risk or "incurred" it. If the relationship between the parties at the time of the injury is one of master and servant,³⁴⁴ or of some other contractual

³³⁹See the commissioners' suggestions for modifying the substantive language of the apportionment section, UNIFORM ACT, *supra* note 314, at 38. No other changes in the Act for a "modified" system were considered necessary.

³⁴⁰IND. CODE § 34-4-33-2(a) (Supp. 1984).

³⁴¹*Id.*

³⁴²W. PROSSER, *supra* note 306, § 68, at 439-40.

³⁴³*Id.* at 440.

³⁴⁴The defense is no longer applicable to master and servant relationships that invoke the coverage of the Indiana Workmens' Compensation Act, since the remedy for workers

nature, the defense is referred to as assumption of risk. If no contractual relation exists, the defense is said to be incurred risk.³⁴⁵ The court that first used the incurred risk terminology gave no particular reason for its adoption,³⁴⁶ nor is any apparent from the later Indiana cases. On several previous occasions the Indiana Supreme Court had addressed the defense simply as "assumption of the risk," and had denied plaintiffs' recovery using that language.³⁴⁷ Some of these early cases considered facts which also presented issues of contributory negligence, however, and in those cases the court seemed to be of the view that assumption of risk and contributory negligence were at least intermingled if not interchangeable.³⁴⁸ As a result, no clear statement of the conceptual grounds of the assumption of risk defense emerged from the opinions and a rather muddled statement of doctrine characterized many of the decisions.

It is clear, however, that near the turn of the century the court began to think of assumption of risk as a principle dependent upon contractual relations between the parties, and contributory negligence as a principle applicable only upon an evaluation of the actions of the parties apart from contract.³⁴⁹ Since the doctrine of assumption of risk as applied in the master and servant cases meant not only that the servant took upon himself those risks which the contract of employment

provided by that statute is exclusive. See IND. CODE § 22-3-2-6 (1982); B. SMALL, WORKMAN'S COMPENSATION LAW OF INDIANA 315 (1950).

³⁴⁵Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Hoffman, 57 Ind. App. 431, 107 N.E. 315 (1914); Indiana Natural Gas Co. v. O'Brien, 160 Ind. 266, 65 N.E. 918 (1903).

³⁴⁶The Indiana Supreme Court employed the concept in the case of Indiana Natural Gas & Oil Co. v. O'Brien, 160 Ind. 266, 65 N.E. 918 (1903). It cited to no earlier Indiana case which had made the distinction, but rather to other jurisdictions and authorities.

³⁴⁷Morrison v. Board of Comm'rs of Shelby County, 116 Ind. 431 (1888); Town of Gosport v. Evans, 112 Ind. 133 (1887); Morford v. Woodworth, 7 Ind. 83 (1855); President and Trustees of the Town of Mt. Vernon v. Dusouchett, 2 Ind. 586 (1851).

³⁴⁸Brucker v. Town of Covington, 69 Ind. 33 (1879), citing to the *Dusouchett* case, 2 Ind. 586 (1851), said that the plaintiff "has no reason to complain of the injury he may sustain" and must be treated as having taken "the risk upon himself," and added the following phrase as an afterthought: "In other words, that a disregard of the knowledge of the existence of such an obstruction, by which an injury results, amounts to contributory negligence." 69 Ind. at 36. In *Evansville & Terre Haute R. Co. v. Griffin*, 100 Ind. 221, 225 (1884), the court said "It was negligence to take the risk." In a later case the supreme court said: "The law accounts it negligence for one, unless under compulsion, to cast himself upon a known peril, from which a prudent person might reasonably anticipate injury." *Morrison v. The Board of Comm'rs of Shelby County*, 116 Ind. 431, 433 (1888). The *Morrison* court cited authority for this proposition which had relied upon a similar proposition from Lord Ellenborough's opinion in *Butterfield v. Forrester*, 183 Eng. Rep. 926 (1809), the case most often cited as the source of the contributory negligence doctrine. See *Town of Gosport v. Evans*, 112 Ind. 133, 137 (1887).

³⁴⁹See *Davis Coal Co. v. Polland*, 158 Ind. 607, 619, 62 N.E. 492, 497 (1902).

expressly covered, but also those that the worker knew about or were necessarily incident to the work activity, the notion that the worker could be deemed to have impliedly assumed the risk of injury merely by entering into the work activities was an important feature of the doctrine.³⁵⁰

The resemblance between these "implied" assumption of risk cases coming out of the workplace and the implied acceptance of risks inherent in ordinary social intercourse was noted by the Indiana Supreme Court. In the first case to use the words "incurred risk," *Indiana Natural Gas & Oil Co. v. O'Brien*,³⁵¹ in response to the defendant's claim that the plaintiff had assumed the risk, the plaintiff argued that the defense could not be raised in a noncontractual setting. Finding that the maxim *volenti non fit injuria* was "not confined alone to cases where the relation of the parties is of a contractual nature,"³⁵² the court held that the plaintiff's cause of action would be barred if the defendant could show that the plaintiff knew of and appreciated the danger and "voluntarily, or of his own choice, exposed himself to or encountered such a danger, thereby *incurring*, or taking upon himself, the risk incident thereto."³⁵³ This passage makes clear that the court considered the elements of incurred risk to be identical to those of assumed risk. It is possible, however, that the court was simply using the words "incurred risk" to express what has been referred to here as "*implied*" assumption of risk, since the court did not actually define "incurred risk." Subsequent cases, however, have focused upon the contractual relationship as the dividing line between the two defenses, rather than the line between "express" and "implied" acceptance. Indeed, the courts have held that a plaintiff may "impliedly" assume the risk in situations arising from a contractual relationship.³⁵⁴

The *O'Brien* case is also important in establishing a line of demarcation between incurred risk and contributory negligence. The court very carefully set out its view that incurred risk was not simply a matter of contributory negligence, and that contributory negligence was not to

³⁵⁰*E.g.*, *Louisville, New Albany & C. Ry. Co. v. Sandford*, 117 Ind. 265 (1888); *Indianapolis & St. L. Ry. Co. v. Watson*, 114 Ind. 20 (1887); *Lakeshore & Mich. So. Ry. Co. v. Stupak*, 108 Ind. 1 (1886), and other cases cited by the *O'Brien* court, *Indiana Natural Gas Co. v. O'Brien*, 160 Ind. 266, 65 N.E. 918 (1903).

³⁵¹160 Ind. 266, 65 N.E. 918 (1903).

³⁵²*Id.* at 272, 65 N.E. at 920.

³⁵³*Id.* at 273, 65 N.E. at 920 (emphasis added).

³⁵⁴*Meadowlark Farms, Inc. v. Warken*, 176 Ind. App. 437, 450, 376 N.E.2d 122, 132 (1978) (citing *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N.E. 741 (1891)). See also *Kroger Co. v. Haun*, 177 Ind. App. 403, 415, 379 N.E.2d 1004, 1011-12 (1978) (where the court, without deciding the matter, speaks as if a plaintiff may *incur* the risk by expressly consenting to it) (citing RESTATEMENT (SECOND) OF TORTS §§ 496B, 496C (1965); James, *Assumption of Risk*, 61 YALE L.J. 141 (1957); W. PROSSER, *supra* note 306, at 440)).

be considered an element of the newly articulated doctrine. Focusing upon the elements of the plaintiff's knowledge, appreciation, and voluntary encounter of the risk, the court contrasted those elements with the "carelessness" and "imprudence" constituting negligence. It observed that "carelessness in regard to a matter is not the same as the exercise of a deliberate choice in respect thereto."³⁵⁵ The court concluded: "It is evident that contributory negligence and incurring the risk of a known and appreciated danger are two independent and separate defenses which should not be confused with each other."³⁵⁶ The *O'Brien* case has never been repudiated, but, despite its explicit treatment of the distinction between contributory negligence and incurred risk, some confusion has persisted in the Indiana courts.³⁵⁷

Definitive treatment of the doctrine of incurred risk and its relationship with contributory negligence was given by the Indiana Court of Appeals in the case of *Kroger Co. v. Haun*.³⁵⁸ Haun was injured when a forklift jacking machine he was operating backed into a stack of boxed groceries, crushing his foot. Defendant Kroger Company contended at trial and on appeal that Haun was contributorily negligent and had incurred the risk of injury in the operation of the forklift. In affirming the judgment for the plaintiff, the court of appeals discussed the doctrines of incurred risk and contributory negligence in great detail,

³⁵⁵160 Ind. at 273, 65 N.E. at 920. In this portion of the opinion, the court was responding to defendant's main argument that plaintiff must allege and prove freedom from assumption of risk. An 1899 statute had shifted the burden of proof from plaintiff to defendant on issues of contributory negligence, and defense counsel argued that the statute had not affected the burden with respect to assumed risk which, they asserted, remained with plaintiff. The court observed that although earlier cases had failed to distinguish between incurred risk and contributory negligence, the precise issue of whether plaintiff was required to negate incurred risk had never been decided. Treating the issue as one of first impression, the court declared that defendant, rather than plaintiff, would bear the burden on the issue. Importantly, however, it also said that its ruling did not affect the previous rule that in *assumption* of the risk cases (master and servant and other contractual relations cases) plaintiff bore the burden. Alternatively, it said that the legislature may have intended the 1899 statute to operate on incurred risk in the same way as contributory negligence since so many court decisions had treated the doctrine as a "species" of contributory negligence, and so defendant's argument would fail under that view as well. The latter part of the opinion was the source of some confusion by a later court in the case of *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Lynn*, 177 Ind. 311, 95 N.E. 577 (1911). In spite of the clear statements by the *O'Brien* court concerning the nature of the defense, the *Lynn* court read the case to say that incurred risk is a "species" of contributory negligence. Only two of the justices that were on the supreme court bench at the time of *O'Brien* were still on the court when *Lynn* was decided. The confusion has persisted. See *infra* text accompanying note 360.

³⁵⁶160 Ind. at 273-74, 65 N.E. at 920.

³⁵⁷See cases cited in *Kroger Co. v. Haun*, 177 Ind. App. 403, 408-10, 379 N.E.2d 1004, 1008-09 (1978); see also *infra* notes 359 and 360.

³⁵⁸177 Ind. App. 403, 379 N.E.2d 1004 (1978).

and concluded that the judgment should not be overturned upon application of either of the two doctrines. Citing the persistent tendency of the courts to confuse the two defenses,³⁵⁹ the court declared its purpose to “attempt to reconcile the incongruity of these decisions and to hopefully clarify and develop a consistency in the use and application of the defenses.”³⁶⁰

First the court outlined the “dissimilarities” between incurred risk and contributory negligence advanced by other courts. The court’s treatment is simplified and rendered graphically below:

Incurring Risk	Contributory Negligence
1. “demands a subjective analysis with inquiry into the . . . actor’s knowledge and voluntary acceptance of the risk.” ³⁶¹	1. “contemplates an objective standard for the determination whether a reasonable man would have so acted under similar circumstances.” ³⁶²
2. “is concerned with the perception and voluntariness of a risk and is blind as to the reasonableness of risk acceptance.” ³⁶³	2. “is concerned with whether the acceptance of the risk was reasonable and justified in light of the possible benefit versus the degree of danger.” ³⁶⁴
3. “involves a mental state of ‘venturousness. . .’ ” ³⁶⁵	3. “under some definitions, describes conduct which is ‘careless.’ ” ³⁶⁶

³⁵⁹The court cited *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Lynn*, 177 Ind. 311, 95 N.E. 577 (1911); *Rouch v. Bisig*, 147 Ind. App. 142, 258 N.E.2d 883 (1970); *Emhardt v. Perry Stadium, Inc.* 113 Ind. App. 197, 46 N.E.2d 704 (1943). See *Kroger Co.*, 177 Ind. App. at 408-09, 379 N.E.2d at 1008.

³⁶⁰177 Ind. App. at 409, 379 N.E.2d at 1008.

³⁶¹*Id.*

³⁶²*Id.* (citing *Freuhauf Trailer Division v. Thornton*, 174 Ind. App. 1, 11, 366 N.E.2d 21, 29 (1977); *Morris v. Cleveland Hockey Club, Inc.*, 157 Ohio St. 225, 105 N.E.2d 419 (1952)).

³⁶³177 Ind. App. at 409, 379 N.E.2d at 1008.

³⁶⁴*Id.* (citing *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. 1963)).

³⁶⁵177 Ind. App. at 409, 379 N.E.2d at 1008.

³⁶⁶*Id.* (citing *Weber v. Eaton*, 160 F.2d 577 (D.C. Cir. 1947); *Pittsburgh, C.C. & St. L. Ry. Co. v. Hoffman*, 57 Ind. App. 431, 107 N.E. 315 (1914)).

4. "in one sense of the concept, has been described as negating a duty and therefore precluding negligence"³⁶⁷

4. "always presupposes a duty and breach thereof, but serves as an affirmative defense to prevent recovery by plaintiff."³⁶⁸

Second, the court discussed the basis of the confusion of the two doctrines in Indiana case law. It observed that in some cases the incurred risk elements of knowledge and appreciation of the risk had been considered satisfied by the application of the objective test of the "reasonable man," and that in some contributory negligence cases the courts had mistakenly required a showing that plaintiff knew and appreciated the peril.³⁶⁹ Noting the split of authority on the question of whether "constructive" knowledge and appreciation of danger should be permitted to satisfy the pertinent elements of incurred risk, the court rejected the "constructive" theory.³⁷⁰ In comparison, contributory negligence, the court concluded, might be established either by proof of plaintiff's actual knowledge of the danger *or* by applying the objective standard of reasonableness. Under the latter method, the plaintiff will be found contributorily negligent despite the lack of actual knowledge if he should have "appreciated or anticipated the danger."³⁷¹ Yet, the requirement of actual knowledge and voluntary acceptance necessary for incurred risk, in the court's view, should never be satisfied by the application of a standard of what plaintiff was required to know in the exercise of ordinary care.³⁷²

³⁶⁷177 Ind. App. at 409, 379 N.E.2d at 1008.

³⁶⁸*Id.* (citing *Gordon v. Maryland State Fair, Inc.*, 174 Md. 466, 199 A. 519 (1938)).

³⁶⁹177 Ind. App. at 409-10, 379 N.E.2d at 1008. As examples of the importation of the reasonableness standard of contributory negligence into incurred risk, the court cited *Meadowlark Farms, Inc. v. Warken*, 176 Ind. App. 437, 376 N.E.2d 122 (1978); *Sullivan v. Baylor*, 163 Ind. App. 600, 325 N.E.2d 475 (1975); *Stallings v. Dick*, 139 Ind. App. 118, 210 N.E.2d 82 (1965). 177 Ind. App. at 410, 379 N.E.2d at 1008-09. It discussed *Rouch v. Bisig*, 147 Ind. App. 142, 258 N.E.2d 883 (1970), and *Hi-Speed Auto Wash, Inc. v. Simeri*, 169 Ind. App. 116, 346 N.E.2d 607 (1976) as troublesome cases where the knowledge and appreciation of peril elements were apparently misapplied. 177 Ind. App. at 412-13, 379 N.E.2d at 1010.

³⁷⁰The court said: "It is our conclusion, however, that the integrity of each doctrine is better preserved when such situations are treated as unreasonable conduct in failing to recognize an obvious risk or danger, therefore constituting contributory negligence." 177 Ind. App. at 411, 379 N.E.2d at 1009.

³⁷¹*Id.* at 413, 379 N.E.2d at 1011.

³⁷²*Id.* at 410, 379 N.E.2d at 1009. It should be noted that the court was *not* attempting to establish a concept of incurred risk tantamount to abolishing the "implied" sense of the defense. The court quoted from authorities taking the position that the plaintiff's subjective state of mind could be inferred from factors such as his own statements, " 'age,

The court then set out an analytical framework for applying the two defenses to avoid the misunderstanding and misapplications of the past. The court believed that the key to clarification lay in an examination of the "various possibilities concerning the conduct of a plaintiff suing in a negligence action."³⁷³ The analysis first identified the "components" present in "every conceivable circumstance in which the conduct of [the] plaintiff is in question".³⁷⁴

- (1) The existence or non-existence of a duty owed by the defendant to plaintiff for the prevention of the danger in question;
- (2) The voluntariness of plaintiff's conduct and his knowledge and appreciation of its possible consequences, or lack thereof; and
- (3) The reasonableness of the risk entailed or conduct engaged in by the plaintiff.³⁷⁵

On its face, the first "component" may appear to be misplaced in an analysis which purports to be directed at an evaluation of the *plaintiff's* conduct, since the relevance of the defendant's duty to the legal significance of the plaintiff's conduct is not immediately apparent. The relevance lies in the court's explanation of the use of the components. The court said the first "component" must be examined to determine "whether the risk or danger in question falls within the ambit of a duty owed by the defendant to plaintiff."³⁷⁶ This first stage of evaluation may conclude the inquiry if the "defendant's duty does not include protection from the risk, either because of express or implied consent."³⁷⁷ It is readily apparent that the court's first concern is whether the plaintiff

experience, knowledge and understanding as well as the obviousness of the defect and danger it poses.' " *Id.* (quoting *Williams v. Brown Mfg. Co.*, 451 Ill. 2d 418, 216 N.E.2d 305, 312 (1970)). The authorities discuss the matter in the context of assumed risk of dangerously defective products, but it is clear that the court was relying upon them for the more general proposition that the knowledge and voluntary acceptance elements of the defense might be inferred from the evidence in the case without applying the normative standard of what plaintiff *should* have known. 177 Ind. App. at 410, 379 N.E.2d at 1009. Furthermore, in discussing the "primary" sense of incurred risk, the court specifically referred to plaintiff's "express or implied consent." *Id.* at 415, 379 N.E.2d at 1011.

³⁷³177 Ind App. at 414, 379 N.E.2d at 1011.

³⁷⁴*Id.*

³⁷⁵*Id.* at 414-15, 379 N.E.2d at 1011.

³⁷⁶*Id.* at 415, 379 N.E.2d at 1011.

³⁷⁷*Id.* This is perhaps a slight overstatement by the court stemming from its abbreviated treatment of the "primary" sense of the general concept of assumption of risk. An examination of the authorities the court cited will show that "primary" assumption of risk includes situations where the defendant owed no duty to the plaintiff at the outset as well as those where, because of the plaintiff's conduct, the risk resulting in actual harm is removed from the scope of the defendant's preexisting duty and the defendant's act is thereby deemed to be no breach. RESTATEMENT (SECOND) OF TORTS §§ 496B, 496C; James, *supra* note 354, at 141; W. PROSSER, *supra* note 306, § 68, at 440; *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. 1963), *cited at* 177 Ind. App. at 415, 379

has taken on the risk in the "primary" sense. The key elements at this stage of the court's analysis are duty and consent. The court was not explicit about what the object of the plaintiff's consent must be, but it is certain that if the plaintiff has consented, that consent removes protection from the risk of harm from the defendant's set of duties. This effect pertains to the court's attempt to analytically separate the incurred risk and contributory negligence defenses because unless the defendant is *primarily* negligent, the plaintiff cannot be *contributorily* negligent.³⁷⁸ If the plaintiff's consent to the risk relieves the defendant of a duty or a breach of that duty, no negligence to which the plaintiff can contribute exists.

This segment of the court's opinion is also important for establishing a perspective upon the place the reasonableness standard occupies in the court's larger analytical framework. Earlier the court had stated the proposition that the reasonableness standard pertains only to issues of negligence. If the court is wrong about this and reasonableness necessarily figures in determinations of plaintiffs' accountability for assuming/incurred the risk, then the "overlap" between the assumption of risk and contributory negligence defenses is complete and the two are interchangeable. The court's discussion of the specific application of the first "component" of its analytical framework attempts to demonstrate the validity of its proposition in the context of "primary" assumed/incurred risk. Although somewhat obscured by the brevity of treatment (the court

N.E.2d at 1011-12. See also *Armstrong v. Mailand*, 284 N.W.2d 343, 348-50 (Minn. 1979). The point seems to have escaped observation by Dean Prosser in his categorization of assumption of risk even though he cites cases where the principle was employed. See cases cited in W. PROSSER, *supra* note 306, § 68, at 446 n.71 and the same cases cited in the Appendix to the RESTATEMENT (SECOND) OF TORTS, § 496C, at 414 (1966), as the basis for Illustration 3 to comment g. The *Haun* court apparently relied more upon Prosser's generalizations than upon the authorities. In fairness to the court, the overstatement seems to stem more from its attempt to briefly comment upon an aspect of incurred risk not directly pertinent to the case at hand rather than from misunderstanding, and its later illustrations of "primary" incurred risk redeem the slight inaccuracy. See 177 Ind. App. at 415-416, 379 N.E.2d at 1012. If this concept of the "primary" sense of the assumption of risk defenses is not kept in mind, the court's statement of the significance of the analysis of the first "component" is susceptible to misunderstanding. Following its outline of "components," the court made the statement that "contributory negligence presupposes the existence of a duty by defendant and breach thereof." *Id.* at 415, 379 N.E.2d at 1012. The court probably did not mean by its brief statement that if the defendant is under a preexisting duty then the reasonableness of the plaintiff's consent to the risk becomes relevant. The court reasoned that absent either one of the elements of duty or breach, no occasion to consider the plaintiff's contributory negligence would arise. *Id.* Since the plaintiff's assumption to risk could defeat either of those elements, the case could be resolved in favor of the defendant simply by ascertaining whether the plaintiff consented to the risk and without inquiring into the reasonableness of that consent.

³⁷⁸The court said, simply: "Where the defendant owes no duty or has not breached an existent duty, the question of contributory negligence is extraneous and not reached." 177 Ind. App. at 415, 379 N.E.2d at 1012.

was, after all, not confronted with a case of “primary” assumed/incurred risk), the logic seems to be this: (1) If accountability for assumed/incurred risk can be decided without reference to the reasonableness of the plaintiff’s conduct, then the defense is not dependent upon that objective standard; (2) if the plaintiff’s consent to the risk relieves the defendant of a duty, then the plaintiff’s prima facie case of negligence against a defendant is defeated; (3) absent a prima facie case of negligence against the defendant, the “question of [the plaintiff’s] contributory negligence is extraneous and not reached”;³⁷⁹ (4) the accountability having been established in assumed/incurred risk without reference to the reasonableness of the plaintiff’s conduct, the independence of “primary” assumed/incurred risk from negligence theory is established.³⁸⁰

The court’s discussion then turned to the “secondary” sense of incurred risk, where the defendant has breached a duty to protect the plaintiff from the risk of injury, but the plaintiff, knowing of the potential for harm and appreciating that potential, has engaged in conduct that relieves the defendant of responsibility for the resulting harm. Noting that the plaintiff’s conduct under such circumstances may either constitute a voluntary acceptance of the risk or a failure to act reasonably under the circumstances, or both, the court acknowledged the area of “overlap” between incurred risk and contributory negligence.³⁸¹ The court admitted that there is no significant practical effect in a failure to distinguish the two defenses in the usual case where both are available.³⁸² The court quoted extensively from the *O’Brien* case and, without really saying so, seemed to disfavor its voluntary act-careless act dichotomy for distinguishing the two doctrines, characterizing that decision as “narrow” and concerned only with “simple negligence.”³⁸³

In this portion of the opinion, without really saying so, the court seems to have favored the “modern” expansive view of contributory negligence. That view, expressed by Dean Prosser and in the Restatement,³⁸⁴ maintains that the defense of contributory negligence is primarily based in the reasonableness of the plaintiff’s conduct, including voluntary acts exposing the plaintiff to known peril. In contrast to the sharp distinctions between incurred risk and contributory negligence maintained by the *O’Brien* court with its voluntary act/careless act dichotomy, the “modern” view, since it permits any act of the plaintiff to be evaluated against the reasonableness standard, including voluntary risk-incurring acts, permits contributory negligence to swallow up the incurred risk

³⁷⁹*Id.*

³⁸⁰*Id.*

³⁸¹*Id.* at 416, 379 N.E.2d at 1012.

³⁸²*Id.* at 418, 379 N.E.2d at 1013.

³⁸³*Id.* at 417-18, 379 N.E.2d at 1013.

³⁸⁴W. PROSSER, *supra* note 306, § 65, at 424; RESTATEMENT (SECOND) OF TORTS § 466 (1965), both quoted by the *Haun* court. 177 Ind. App. at 417, 379 N.E.2d at 1013.

defense. The *Haun* court attributed judicial disagreement about whether "secondary" assumed risk defenses are merely species of contributory negligence or are independent defenses to the competing definitions of contributory negligence: the "narrow" definition tied to "carelessness," as in the *O'Brien* case, and the "broad" definition embracing the all-encompassing view of reasonableness.³⁸⁵

The court did not, however, explicitly adopt either of the competing views. The court preferred to leave them as it found them, being content to say that pragmatically the distinction is "without substantive significance" where both are applicable.³⁸⁶ The court seems to have been content to allow either defense to operate interchangeably within the area of their functional overlap, but it offered no thoughts about its view of the extent of the overlap.

The court asserted the importance of distinguishing the defenses, however, in cases where the nature of the claim makes contributory negligence unavailable but where incurred risk is still a proper defense. The court raised guest statute and strict tort liability cases as examples, but it follows that any case where the theory of the defendant's culpability is something other than negligence could be similarly treated. The court pointed out the perplexity faced in those jurisdictions governed by the "expansive" definition of contributory negligence when cases presenting a necessity for distinguishing the two defenses arise: "If incurred risk is a 'type' of contributory negligence, then either: (1) incurred risk cannot be a defense to such actions since contributory negligence is not, or (2) contributory negligence is a defense since incurred risk is."³⁸⁷ The *Haun* court rejected the merger of the two defenses, establishing that the analytical separation of the defenses should be maintained where it makes a pragmatic difference to do so. This separation is based on the determination of whether the plaintiff freely and intelligently chose to accept the consequences of the risk, a determination similar to that made in "primary" incurred risk situations. The court stated its conclusion in the following terms:

While contributory negligence (unreasonable conduct) is *not* a defense in such cases, it may nevertheless be present in the form of conduct which includes the additional elements of voluntary and knowing incurrence. This is, in effect, the "overlap." In such situations, the mere presence of unreasonable conduct, and therefore contributory negligence, does not preclude plaintiff from recovery, but neither does it prevent the defendant from asserting the incurred risk elements of the conduct. The "un-

³⁸⁵177 Ind. App. at 417-18, 379 N.E.2d at 1013.

³⁸⁶*Id.*, at 418, 379 N.E.2d at 1013.

³⁸⁷*Id.*, 379 N.E.2d at 1014.

reasonableness” of the conduct is not determinative in such actions.³⁸⁸

The court was not merely saying, however, that analytical separation should be maintained between incurred risk and contributory negligence principles only where the latter defense is unavailable. The discussion of the guest statute and strict liability cases was intended as reinforcement for its assertion that analytical separation is necessary in any case in order to avoid confusion. The court then proceeded to apply its analysis to the facts of the case, first to determine whether the plaintiff could, as a matter of law, be said to have incurred the risk (without reference to the reasonableness of the plaintiff’s lack of knowledge) and then, independently, to determine whether he could be said to have acted unreasonably in failing to discover the risks or in other conduct. It found for the plaintiff in both branches of this application, but the clear import of its treatment is that it would have reached a different result had it been able to conclude from the evidence that the plaintiff knew, appreciated, and voluntarily encountered the risk without regard to the reasonableness of those factors.³⁸⁹

By refusing to treat “implied secondary” incurred risk and contributory negligence as a homogenized mixture, the *Haun* court’s analysis, application, and conclusions means that the court discerned the nonfault basis of accountability of incurred risk, and intended to give it currency. It required a factual determination of the elements of incurred risk without reliance upon a normative judgment call about whether the plaintiff *should* have known or appreciated the risk. It required and applied an analysis of the plaintiff’s voluntariness in encountering the risk without reliance upon an objective determination that he acted so unreasonably that he must be treated as a volunteer. If the analytical separation required by the court is maintained in the face of the transformation of contributory negligence into comparative fault, the plaintiff would still be totally barred if the incurred risk elements were satisfied, regardless of whether his conduct was totally reasonable or was unreasonable enough to invoke the apportionment principle. The refusal of the court to rely upon fault to satisfy incurred risk elements, as well as the significant difference between the Uniform Act’s approach to assumed risk and the court’s approach to incurred risk call into question the propriety of the legislature’s unqualified inclusion of “incurred risk” in the Comparative Fault Act’s definition of “fault.”

D. Problems of Interpretation Raised by the Indiana Act’s Language

1. Introduction.—Variations in the interpretation and application of the Comparative Fault Act concerning the assumption of risk defenses

³⁸⁸*Id.* at 419, 379 N.E.2d at 1014.

³⁸⁹*Id.* at 419-21, 379 N.E.2d at 1014-15.

are imminent by virtue of the use of "unreasonable" as a qualifier of "assumed risk" and no qualification of "incurred risk." The thrust of the interpretations will depend upon the extent to which the views of the *Haun* court about incurred risk are considered to have been incorporated into the Act, the extent to which the views propounded in the Uniform Act's commentary are taken to have been adopted by the Act, and the support in logic, policy, and function each interpretation can muster.

If one were to assume that the words of the statute alone controlled its interpretation, then the conclusion easily follows that only "unreasonable" implied assumptions of risk are incorporated into comparative "fault" while all of incurred risk is included. When it comes to applying the Act to actual cases, however, interpretation may not prove to be such a simple matter. Behind the simple language of the Uniform Act are its potentially complicating comments. Litigants will certainly attempt to use the Uniform Act commentary on both sides of the bar. The words "incurred risk" are surely included, but the *Kroger v. Haun* formulation of that defense will just as surely be argued as a limitation upon the meaning of those words. If less than the full assumed risk doctrine and all of the incurred risk doctrine are taken to be included by the statute, then questions of consistency between the defenses arise which may not be sustainable under the new principles of comparative fault. Two conflicting interpretations are possible once the task of interpretation is carried beyond the mere language of the definition, one of which would incorporate the *Haun* court's formulation of incurred risk, and the other which would abandon the definition of incurred risk articulated by *Haun*, in effect reading the statute as legislatively overruling the court's holding.

2. A "Modified" Assumed Risk - "Limited" Incurred Risk Interpretation.—The Uniform Act, by its terminology and as expanded by the commentary accompanying it, is intended to apply to "implied secondary" assumption of risk situations; in addition, it has adopted the expansive merger theory of assumption of risk and contributory negligence discussed in *Haun*.³⁹⁰ The Uniform Act's commentary particularly illustrates the commissioners' view that in cases where the definition applies, unless the plaintiff's deliberate conduct can be deemed faulty, the apportionment principle is not triggered.³⁹¹ All of this means that in "implied secondary" assumption of risk cases where the defendant fails to prove that the plaintiff's actions were unreasonable, the plaintiff recovers fully for his injuries. Yet, the commissioners did not simply

³⁹⁰See *supra* text accompanying notes 384-86.

³⁹¹UNIFORM ACT, *supra* note 314, at 38. The commentary also includes the statement: "this [definition of "fault"] is the case of unreasonable assumption of risk, which might be likened to *deliberate* contributory negligence and means that the conduct must have been voluntary and with knowledge of the danger." *Id.* (emphasis added).

incorporate all of assumed risk into the Uniform Act. While they adopted the expansive view of the "overlap" area, some of assumed risk remains outside the Uniform Act's comparative fault scheme. Implied and express "primary" assumption of risk and express "secondary" assumption of risk remain outside the coverage of the definition of "fault." Where the defendant successfully establishes one of these three segments of the defense, the common law features of the doctrine are operable and the plaintiff's action will fail completely. Thus, even though the Uniform Act adopts the expansive contributory negligence view and incorporates it into comparative fault, the use of the modifier "unreasonable" and the commentary explaining the meaning of the phrase demonstrate the intent to include only the segment of assumption of risk cases in which the plaintiff's encounter with a risk created by the defendant's negligence would fail to satisfy an objective standard of reasonableness. The phrase "not constituting an enforceable express consent" demonstrates the intent that, within the preceding class of cases, only those in which the plaintiff impliedly knew, appreciated, and encountered the risk are to be considered as "fault." This discussion will refer to the defense subsumed in the Uniform Act's definition as "modified" assumption of risk.

If the Indiana General Assembly is presumed to have been aware of the coverage of assumption of risk intended by the commissioners, then it may be said that the adoption of the very same language as the Uniform Act brought with it the same intent. If the General Assembly is presumed to have been aware of the *Kroger v. Haun* decision, it may be said that its inclusion of the words "incurred risk" in the statute brought with those words the court's pronouncements upon them. The *Haun* court's view of "implied secondary" incurred risk, however, is not the same as the Uniform Act's view of "implied secondary" assumption of risk. The Uniform Act's concept of the defense permits the plaintiff to recover if the fact finder is unable to conclude that the plaintiff's risk-assuming conduct was unreasonable. A similar case subject to the *Haun* analysis would still result in a total bar under incurred risk because the reasonableness of plaintiff's conduct would be irrelevant. Furthermore, since the *Haun* court equated "primary" incurred risk with "primary" assumed risk, it follows that if a defendant proves that a plaintiff's incurral of the risk had the effect of negating a duty or breach, the plaintiff's action will fail and no occasion for apportionment will arise. Since this view maintains that some aspects of incurred risk should remain outside of the apportionment, this discussion will refer to the segment of incurred risk which the *Haun* court's analysis would permit to be treated as comparative "fault" as "limited" incurred risk. A summary of the conclusions reached under this interpretation are:

- (1) If the segment of "implied secondary" assumption of risk is the appropriate defense, the defendant may invoke the apportionment principle by proving that the plaintiff's conduct was unreasonable.

- (2) If the plaintiff's conduct constituting "implied secondary" assumption of risk was reasonable, the defendant's comparative fault defense fails and the plaintiff's recovery is not apportioned.
- (3) If the circumstances present a "valid and enforceable express consent" or "a lack of violation of duty," the segment of "implied secondary" assumption of risk is not applicable and the common law principles of assumption of risk remain as a complete bar.
- (4) If "secondary" incurred risk is the appropriate defense whether "express" or "implied," the defendant may invoke the apportionment principle by satisfying the subjective elements of incurred risk (knowledge, appreciation of peril, and a voluntary encounter), but may *not* satisfy those elements by proving the unreasonableness of plaintiff's conduct.
- (5) If "primary" incurred risk is the appropriate defense, the apportionment principle is not invoked and the common law principles of incurred risk remain as a complete bar.
- (6) Defendant may in any case be able to compel apportionment by proving contributory fault in some other respect.

3. *A "Modified" Assumed Risk - "Total" Incurred Risk Interpretation.*—Arguments that the legislature intended not to incorporate the *Kroger v. Haun* formulation of incurred risk into the statute at all, but rather to legislatively overrule that case should be expected. The main premise of these arguments will be that by including the general, unqualified term of "incurred risk" in the definition of "fault" the legislature evidenced its intent that all issues of incurred risk, whether "primary" or "secondary," "express" or "implied," be subject to comparative fault principles.

The incentive for pressing such an argument lies with defendants in some contexts and with plaintiffs in others. By breaking the incurred risk defense out of the definitional boundaries established for it by the *Haun* court, a defendant might be able to invoke the apportionment principle under circumstances which would not have satisfied the *Haun* concept of incurred risk. For example, Indiana courts have permitted the trier of fact to overlook the plaintiff's contributory negligence in cases where the defendant's conduct is shown to be willful, wanton, or reckless.³⁹² In such a case, the ability to prove the presence of subjective

³⁹²Indiana courts have, on several occasions, in different settings, firmly stated the proposition that the plaintiff's contributory negligence is not a defense to liability for the defendant's willful, wanton, or reckless conduct. *E.g.*, *Hoesel v. Cain*, 222 Ind. 330, 53 N.E.2d 165 (1944); *Kizer v. Hazelett*, 221 Ind. 575, 49 N.E.2d 543 (1943); *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N.E. 504 (1893); *Brannen v. Kokomo Greentown & Jerome Gravel Road Co.*, 115 Ind. 115, 17 N.E. 202 (1888); *Palmer v. Chicago, St. Louis*

knowledge, appreciation of the risk, and a voluntary encounter with it, as required by the *Haun* court, may be impossible. Proving that the plaintiff *should* have known and appreciated the risk and that the plaintiff should be *taken* to have voluntarily encountered it may be a relatively simple matter. Once the *Haun* shackles are removed, the defendant at least can argue the matter before the jury. Plaintiffs' incentive arises in the context of "primary" incurred risk. If a plaintiff subject to that defense were able to invoke the apportionment principle to avoid the total bar which the limited inclusion argument maintains, he would at least be able to cut his losses. He too could present the argument to the jury as to how reasonable he was in consenting to the risk.

The interesting aspect of this argument is that, as demonstrated by its appeal to both sides of the bar depending upon the circumstances, it really is not founded upon a particular theory of incurred risk or an attempt to keep some principle inherent in that defense internally consistent with comparative fault. It is rather based upon the broad appeal that the objective standard holds for lawyers in its flexibility. The ability of advocates to argue the reasonableness of their clients' conduct produces and maintains the flexibility. Once reasonableness becomes the focus, the nonfault aspects of the defense drop from view. Proponents of this interpretation might assert that, in contrast to the Uniform Act's modified inclusion of assumption of risk, which the commissioners "likened to deliberate contributory negligence,"³⁹³ the inclusion of incurred risk in the Indiana Act is general and unqualified. The contention would be that the legislature intended to include not only that segment of incurred risk which may be likened to deliberate contributory negligence and which applies to conduct which "must have been voluntary and with knowledge of the danger,"³⁹⁴ but also that part of incurred risk which may be likened to *nondeliberate* contributory negligence, and which would apply to *nonvoluntary* conduct and *constructive* knowledge of the danger.

Further support for this construction might be asserted to reside in the apportionment principle itself. This branch of the argument would contend that the motivating force behind the Act was to abolish the harsh total bar of contributory negligence, and that the same motivation induced the unqualified inclusion of incurred risk. To the extent "that the whole spirit of the defense and of the reasoning it employs bears the strong imprint of *laissez faire* and its concomitant philosophy of

& Pittsburgh R.R. Co., 112 Ind. 250, 14 N.E. 70 (1887). In *Indianapolis Union Ry. Co. v. Boettcher*, 131 Ind. 82, 28 N.E. 551 (1891), and *Terre Haute, Indianapolis & Eastern Traction Co. v. Maberry*, 52 Ind. App. 114, 100 N.E. 401 (1913), the courts actually permitted plaintiffs to recover. See also *Freitag v. Chicago Junction Ry. Co.*, 46 Ind. App. 491, 89 N.E. 501 (1909) *op. mod. on other issues*, 46 Ind. App. 503, 92 N.E. 1039 (1910).

³⁹³UNIFORM ACT, *supra* note 314, at 38.

³⁹⁴*Id.*

individualism which has passed its prime,"³⁹⁵ the Comparative Fault Act marks a point of departure from that policy and philosophy in the assignment of accountability. The argument supporting this interpretation would contend that, outside the context of contractual dealings between the parties, the comparative fault system should be permitted to work its tempering effect upon the old common law principles of incurred risk. If these premises are adopted as valid, the *Haun* court's analysis of the defenses becomes a mere historical artifact. Its limitations upon incurred risk become irrelevant because the "incurred risk" part of "fault" is something entirely different from the common law defense the court tried to define. In effect, this interpretation argues that "incurred risk," whatever it might mean in the context of an action based on "fault," will trigger the apportionment principle. The "expansive" definition of contributory negligence rejected by the *Haun* court will have been outstripped by an even more expansive concept of "fault." Contributory negligence and incurred risk had their area of "overlap" which the *Haun* court almost begrudgingly acknowledged because of the practical impossibility of distinguishing results. This "total inclusion" interpretation of the definition of "fault" maintains that the area of "overlap" is coextensive with the boundaries of "incurred risk"; that whenever "incurred risk" is taken by the trier of fact as an appropriate description of the plaintiff's conduct, that conduct constitutes "fault" to be apportioned.

Summarized below are the conclusions reached about the operation of the Comparative Fault Act if this interpretation is accepted:

- (1) If the segment of "implied secondary" assumption of risk is the appropriate defense, the defendant may invoke the apportionment principle by proving that the plaintiff's conduct was unreasonable.
- (2) If the plaintiff's conduct constituting "implied secondary" assumption of risk was reasonable, the defendant's comparative fault defense fails and the plaintiff's recovery is not apportioned.
- (3) If the circumstances present a "valid and enforceable express consent" or "lack of violation of duty," the segment of "implied secondary" assumption of risk is not applicable and the common law principles of assumption of risk remain as a complete bar.
- (4) If incurred risk is the appropriate defense, whether "primary," "secondary," "express," or "implied," defendant is able to invoke the apportionment principle by satisfying the elements of incurred risk (knowledge, appreciation of peril, and a voluntary encounter) and may satisfy those

³⁹⁵2 F. HARPER & F. JAMES, *supra* note 307, § 21.3, at 1174.

elements by the use of either a subjective or an objective standard.

- (5) In no case will the successful employment of the incurred risk defense result in a total bar unless by incurring the risk the plaintiff was more than 50% at "fault."
- (6) Defendant may in any case be able to compel apportionment by proving contributory fault in some other respect.

E. Appraisal of the Competing Interpretations

1. *The Clash of Fault and Nonfault Bases.*—In the *Haun* case, the court was concerned that the pragmatic operational similarity of the total bar of incurred risk and the total bar of contributory negligence would obscure the conceptual and functional differences between them. It went to great lengths to lay out an analytical framework designed to maintain a separation based upon those differences. It acknowledged that in some cases, where separation made no difference, no great harm would come from treating the two as if they were simply contributory negligence. It demonstrated, however, that certain classes of cases exist where the independent existence, availability, requirements, and conceptual underpinnings of the two defenses do make a difference. The court's guest statute illustration may have been diluted by the General Assembly's recent contraction of the class of plaintiffs affected by the provisions of that statute,³⁹⁶ but the court's concern remains valid nevertheless in cases where the contributory negligence defense would not have been entertained at common law.

If the Comparative Fault Act is interpreted as totally incorporating incurred risk into "fault," the differences between incurred risk and contributory negligence found to be important by the *Haun* court will be nullified. If this interpretation prevails in a guest statute case, for example, a defendant will be able to invoke the apportionment function of the Act by showing that the plaintiff incurred the risk because his conduct did not conform to the reasonableness standard. Contrary to the principle set down in *Haun*, however, where "[t]he 'unreasonableness' of the conduct is not determinative,"³⁹⁷ the reasonableness standard under this interpretation *becomes* determinative in such a case. The plaintiff's "constructive" knowledge and objectively attributed appreciation of the risk would be determined by application of the reasonably prudent person standard instead of the subjective standard of actual knowledge and appreciation. The defendant would argue that no one in the plaintiff's position could have failed to have seen and appreciated the risks presented

³⁹⁶The 1984 amendment to the guest statute limits the class of persons subject to the statute to the parents, spouse, child or stepchild, brother or sister of the driver and hitchhikers. Act of Mar. 1, 1984, Pub. L. No. 68-1984, Sec. 2, § 1, 1984 Ind. Acts 925, 925-26 (codified at IND. CODE § 9-3-3-1 (Supp. 1984)).

³⁹⁷*Kroger Co. v. Haun*, 177 Ind. App. 403, 419, 379 N.E.2d 1004, 1014 (1978).

by the defendant's willful, wanton, and reckless driving. Defendant could make such an argument to the jury in spite of the lack of subjective awareness, appreciation, or voluntariness in plaintiff's encounter with the risk. In essence, the plaintiff's right to compensation will be limited by the degree to which he was negligent in encountering the risk. This importation of contributory negligence into guest statute cases would represent a substantial expansion of defendants' abilities to defeat such causes of action. It would set up the anomalous possibility for a defendant to argue that the more patently culpable *her* acts were, the greater the reason that the plaintiff should have known and appreciated those acts as a risk. On the other hand, since the reasonableness standard puts to work the apportionment principle,³⁹⁸ some plaintiffs who surely would have lost their case at common law for having incurred the risk will, under this interpretation, recover something for their injuries. So construed, the Act also expands the abilities of plaintiffs to recover in guest statute actions.

Cursory analysis might result in the conclusion that since plaintiffs as well as defendants are benefited by this interpretation, the interests of both sides of the issue are addressed, there is a theoretical washout, and the construction of the statute should stand as a valid one. However, recall that plaintiffs suing subject to the guest statute have a higher threshold to cross in order to establish liability at all.³⁹⁹ Requiring plaintiffs to satisfy a more rigorous basis for liability and then permitting defendants subject to such liability to escape part of it by proving mere unreasonable conduct by plaintiffs results in a balance of interests drastically different from that struck by the adoption of the guest statute. It may turn out in actual operation that because the trier of fact would be "comparing" mere negligence with wanton or willful misconduct plaintiffs will suffer no significant diminution in recovery. The fact that

³⁹⁸If a plaintiff subject to the *Haun* court's view of "primary" incurred risk is permitted to escape the total bar upon the logic that "incurred risk" is unqualifiedly part of the system of comparative fault by virtue of its inclusion in the definition of "fault," and that comparative fault results in a total bar only if the plaintiff's "fault" exceeds 50% of the "total fault," such a plaintiff is likely to press the logic to argue that he was not at "fault" at all because he acted reasonably in his risk-incurring behavior, or that even if he was at "fault" by incurring the risk, he was less at "fault" than the defendant because he acted reasonably and she did not. The variations are limited only by the range of an advocate's imagination. The point is not that the total inclusion of incurred risk into the apportionment principle necessarily invokes an evaluation of the reasonableness of the plaintiff's conduct. Rather, it is that such an inclusion *permits* the reasonableness of the plaintiff's conduct to be evaluated under circumstances where a nonfault-based view of incurred risk would prohibit such an evaluation. See generally 2 F. HARPER & F. JAMES, *supra* note 307, § 21.1, at 1164-65; W. PROSSER, *supra* note 306, § 68, at 447.

³⁹⁹The Indiana guest statute requires these plaintiffs to prove "wanton or willful misconduct." IND. CODE § 9-3-3-1 (Supp. 1984).

plaintiffs were subject to no reduction at all, even when they were negligent, prior to the adoption of comparative fault, is reason enough for the courts and the legislature to observe the operation of the apportionment principle carefully with a view to ensuring that the objectives of both statutes are fairly served.

The observations of the *Haun* court are valid on a much broader and more important scale. Having discerned that the basis of accountability for incurred risk is not fault, the court attempted, through its guest statute discussion, to demonstrate that under some circumstances where the fault-based defense of contributory negligence with its total bar may be stripped away, the nonfault based accountability of incurred risk remains unaffected. The Comparative Fault Act calls into play those same considerations. The Act has stripped away the fault-based total bar of contributory negligence, replacing it with the apportionment principle. Whatever the policy and philosophical orientation the incurred risk defense might reflect in Indiana, the *Haun* court gave currency to it and insisted upon analytical separation of the defenses. The "total inclusion" interpretation of the Comparative Fault Act would discard the *Haun* definition of incurred risk and treat the defense as an open-ended element of "fault." Adoption of a comparative fault system brings about certain drastic changes in the process for adjusting the rights of individuals who have become involved in a relationship of nonconsensual liability. It does not mean that common law concepts of tort law which do not have fault as their foundation should automatically be transformed into fault-based concepts, even where the concept has been included in a definition of "fault."

Certain aspects of the Act belie a legislative attempt to fundamentally overturn Indiana case law. The patchwork drafting job is the first indication. The background of the Act, after all, is the Uniform Act, to which "patches" of changes were added and subtracted to suit the preferences of Indiana legislators and lobbyists. The Uniform Act addresses a unitary doctrine of the assumed risk defenses which treats all classes of plaintiffs alike, whether related by contract or not. There is no evidence that the Indiana legislature departed from the Uniform Act's policy and philosophical positions on the intended effects of assumption of risk in any respect. In addition, the adoption of a "modified" system of comparative fault hardly represents the shift in policy and philosophy necessary to support the argument for abandonment of the total bar in incurred risk for all cases. The total bar of a plaintiff's action under some circumstances remains an important feature of the Act. Legislation purported to have such a drastic effect upon the common law as the total transformation of incurred risk into comparative fault ought to display more intrinsic evidence of a legislative intention to overrule the common law than the two words "incurred risk" tucked into the carefully

turned phrases of an act intended as a model for a different system.⁴⁰⁰

2. *Reconciling "Fault" and Nonfault.*—Other problems associated with the inclusion of the unqualified term "incurred risk" in the definition of "fault" are solved differently by the two alternative interpretations. Consider a case where *P* observes *D*'s risk-producing conduct and perceives the potential for his own benefit if he can continue the observation. *D* sees *P* begin to get too close and stops the activity. *P* says to *D*: "I see that your conduct produces a risk of harm to me and that the harm may be very serious, even fatal. However, your conduct has great value to me and I am willing to take that risk upon myself. I relieve you of any duty of care toward me. Please continue as you were doing."⁴⁰¹ If the *Haun* case is incorporated into the Act's inclusion of incurred risk, *P* will have expressly relieved *D* of the duty of ordinary care and could not complain of *D*'s injurious conduct.⁴⁰² Whether *P*'s conduct was fault-ridden is irrelevant, and the effect of that conduct is to remove *D*'s conduct from the realm of fault. No fault of *P* or *D* would exist to be compared.

The matter is much more complicated under the "total inclusion" interpretation. Calling *P*'s incurrance of risk "fault" does not change the issue of whether he placed the risk of injury within the realm of his personal responsibility. In this setting, he either took on that responsibility or he did not. Translated into the new rubric of "fault," one view of the situation is that *P* was either 100% or 0% at "fault," because he either incurred the risk or he did not. If this view prevails, however, the apportionment principle will have been rendered a nullity, and some pressures will be exerted in litigation to incorporate the old reliable reasonableness standard to avoid one-sided results.

Plaintiffs' counsel, facing the possibility of a 100% "fault" assessment for their clients in an "express" "primary" incurred risk case

⁴⁰⁰The 1984 amendments to the Act also removed other nonfault-based concepts from the definition of "fault" with the deletion of strict liability and warranty from the definitions section. Without an official legislative history, it is risky to attach any significance to this modification of the Act beyond the mechanical change of language. However, the deletion does show that the legislature is not yet ready to extend comparative fault into causes of action founded upon theories of accountability having no basis in fault. This reluctance to blend the two bases of accountability in one context may be reason enough to look for strong evidence of an intention to bring about such a blend in other contexts. Such evidence does not exist in the simple language of the definitions section. Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2(a), 1984 Ind. Acts 1468, 1468-69.

⁴⁰¹Readers who simply cannot proceed further without sufficient detail to make the hypothetical "concrete" may wish to assume that *D* is a knifethrower practicing her art. *P* is a photojournalist who sees a peculiar human interest angle or an especially interesting play of light and believes he must get within the range of the flying knives to get the "perfect shot."

⁴⁰²See the *Haun* court's discussion, 177 Ind. App. at 414-16, 379 N.E.2d at 1011-12.

such as this, will surely try to blunt that possibility by arguing the reasonableness of their clients' conduct. In effect, even though the defendant theoretically would have the option of satisfying the incurred risk elements by using the subjective or objective standard, the objective standard will always creep into the case. Pragmatically, contributory fault will have completely swallowed up the incurred risk defense. The trier of fact will have to consider the circumstances of each case in a manner similar to that necessary to resolve issues of contributory negligence in order to reach the determination of reasonableness. The *degree* of unreasonableness of the plaintiff's conduct will be translated into a percentage of accountability assigned in accordance with the usual apportionment procedures of the Act.

What is most noticeable about this operation is that it is not mechanically necessary, indeed, it may actually be impossible to assess the fault of the defendant during the process. The defendant's percentage of "fault" will have been reached by deduction: 100% minus plaintiff's degree of unreasonableness equals defendant's "fault." This would be mathematically true in spite of the fact that under ancient concepts of tort liability the defendant was simply not at fault.

Aside from the effect upon the apportionment process that the "total inclusion" interpretation has, consider the effect upon the actors' conduct. It requires the defendant to consider what she knows about the plaintiff's circumstances before continuing with her risk-producing conduct. If she knows enough about those circumstances to conclude that the plaintiff's conduct is unreasonable and is secure in her belief that a trier of fact would agree with her, she may proceed with the conduct knowing that the plaintiff will be at least partially accountable for any injuries that result. If her assessment of the situation produces the belief that the plaintiff could be found to have acted reasonably in incurring the risk, the defendant would be foolish to proceed as if she had been relieved of her duty. Even assuming the improbable, that actors will develop a sufficiently sophisticated understanding of the technical niceties of such an interpretation and then decide upon their course of conduct in accordance with that understanding, this interpretation presents a rather unorthodox framework to aid human judgment.

3. *Differential Treatment of Assumed and Incurred Risk Defenses.*—Serious difficulties are present in both interpretations because of the differences in the Act's operation upon assumed and incurred risk defenses. With respect to the "limited inclusion" interpretation, the difference is that the defendant may establish "implied secondary" assumption of risk by proving the unreasonableness of the plaintiff's conduct, whereas the defendant in an incurred risk case must prove actual subjective knowledge, appreciation, and voluntariness. Furthermore, if the defendant fails to prove *unreasonable* assumption of risk, the plaintiff recovers fully. In the incurred risk context, it does not

matter how reasonable the plaintiff's conduct was, satisfaction of the incurred risk elements totally bars the plaintiff's recovery.

In a case involving two plaintiffs whose behavior was identical suing the same defendant for the same negligent act, a court following this interpretation would be required to instruct the jury differently concerning the first plaintiff who happened to be the defendant's tenant, for example, than it would concerning the second, who was not. The jury would be told that the first plaintiff's behavior could be evaluated using the objective reasonably prudent person standard on the question of whether he assumed the risk. It would be told that the reasonableness of the second plaintiff's behavior is irrelevant, and that they can find he incurred the risk only if he subjectively knew, appreciated, and voluntarily encountered the risk.

The old distinction based upon the existence of a contractual relationship between the parties does not sustain the difference in treatment. Since the unreasonable assumption of risk defense would be available to contracting parties only when the express contractual terms fail to address the risk-producing the injury, the determination of who is to benefit from apportionment, whether plaintiff or defendant, has no logical connection to the contractual relationship. In practical terms, on the issue of whether the plaintiff consented to the risk, the contractually-related parties are on the same footing as the nonrelated parties. The new system of comparative fault should not operate so differently between cases simply because one set of litigants happens to have entered a contract and another set has not.

The legislature would have done better to have incorporated incurred risk into the definitional phrase borrowed from the Uniform Act and expanded the definitions section to clearly state an intention to sweep "implied secondary" consent to the risk into comparative fault. One possible way to accomplish this would be to incorporate the following terminology into the definitions section of the Act:

"Fault" includes . . . unreasonable assumed or incurred risk not constituting an enforceable express consent

"Assumption of risk" and "incurred risk":

- (1) include only the "implied secondary" senses of those terms, that is, where those terms denote that plaintiff cannot be said to have actually known, appreciated, and voluntarily encountered a risk produced by the negligence of defendant, but only impliedly has done so.
- (2) do not include the "primary" senses of those terms, that is, where those terms denote that plaintiff's conduct has the effect of relieving defendant of a duty or breach of that duty.
- (3) shall invoke the apportionment of damages provisions of this Act if and only if:

- (a) the "implied secondary" sense of the terms apply to plaintiff's conduct, and
 - (b) plaintiff's conduct has been deemed unreasonable by the trier of fact.
- (4) shall remain as a complete defense to plaintiff's action in any case where the senses of:
- (a) "express or implied primary" assumed or incurred risk, or
 - (b) "express secondary" assumed or incurred risk apply to the circumstances giving rise to plaintiff's claim.

The suggested provisions are complex, but the issues raised in the relationship of the nonfault assumption of risk defenses to a comparative fault system are themselves complex, as this discussion has demonstrated. The suggestions definitely spell out their intention to partially overrule *Haun* and to ensure the consistent operation of the apportionment principle in the troublesome area of "overlap" between the assumption of risk defenses and contributory negligence.

The *Haun* court made a commendable effort to articulate a theoretical separation between the two defenses and in that effort did much to dispel the theoretical confusion that had persisted in the case law. It operated, however, only in the realm of the theoretical. The court was called upon only to decide whether plaintiff *Haun* could have been found to have incurred the risk or to have been contributorily negligent as a matter of law. Applying its analysis, it found enough doubt in the record to answer the questions in the negative. It did not have to perform the more difficult task of deciding as a matter of fact whether *Haun* incurred the risk or was contributorily negligent. As demonstrated in an earlier section of this Article, the trier of fact will likely have much difficulty maintaining an analytical distinction between the defenses.⁴⁰³ A jury's decision, made in secret behind the deliberation room door, is more likely to be influenced by the jury's collective experience and common sense than by a theoretical distinction which is difficult to grasp and even more difficult to apply.⁴⁰⁴ Perhaps it is time that the law of comparative fault follow experience in this category of cases. The proposed modification permits the jury to find the elements of incurred risk to be satisfied by the application of objective criteria and the reasonableness standard in cases of "implied secondary" incurred risk, that most troublesome of areas where contributory fault and the assumption of risk defenses "overlap." At the very least, the General Assembly should define "fault" in this regard to include "unreasonable assumed or incurred risk not constituting an enforceable express consent."

⁴⁰³See *supra* text accompanying notes 396-400.

⁴⁰⁴The difficult guest statute cases of concern to the *Haun* court remain troublesome, but perhaps not as much as one might suspect. First, since "reasonable implied secondary" assumption of risk does not bar recovery, and since "willful, wanton or reckless" acts

Much of the foregoing discussion concerning the different treatment of risk-assuming and risk-incurring plaintiffs applies to the "limited inclusion" interpretation. The differences permitted under the "total inclusion" interpretation, however, are more drastic and much less supportable. Since this construction permits risk-incurring plaintiffs to invoke apportionment when they have incurred the risk in any of the senses employed in this discussion,⁴⁰⁵ such plaintiffs enjoy a marked advantage over their risk-assuming peers who receive apportioned recovery only in the "implied secondary" category of cases. Conversely, plaintiffs who reasonably assume the risk in the "implied secondary" category are entitled to full recovery while all risk-incurring plaintiffs are subject either to apportionment or a total bar.

Consider an example where plaintiff *A* and defendant *C* are contractually related, but plaintiff *B* and the same defendant are not so related. If *A*'s contract with *C* contains provisions sufficient to satisfy the assumption of risk elements, he can invoke the apportionment principle only by establishing the unenforceability of the provisions as an invalid exculpatory clause. Plaintiff *B*, on the other hand, who may have orally consented to the risk in the same terms as used by *A*, is spared the burden of proving unenforceability, and is permitted to benefit from the application of the apportionment principle.

The reasons for rejecting this difference in treatment of risk-assuming and risk-incurring plaintiffs are the same as discussed in connection with the "limited inclusion" interpretation. Since the differential treatment here encompasses a broader segment of cases, however, the reasons for avoiding the effect are multiplied by the number of possibilities where the difference could arise. There is simply no firm basis in logic, policy, fairness, or precedent for permitting one plaintiff to benefit from apportionment while another plaintiff presenting virtually the same facts as the first is totally barred merely because the second plaintiff happened to have entered into a contract with the defendant.

These comments should not be construed as an argument for sweeping all of assured risk into comparative fault as the "total inclusion" interpretation would do with incurred risk. All that has been said that is critical of the total inclusion of incurred risk applies with equal force to the total inclusion of assumed risk. The total inclusion of incurred

are specifically made subject to the apportionment principle, the trier of fact is given much greater leeway to adjust the accountability and liability of the risk-incurring plaintiff and the willful and wanton defendant than it could have exercised under the negligence system at the time of the *Haun* decision. Second, if the courts view the guest statute as a declaration of the policy that gratuitous passengers in motor vehicles impliedly assume the risks of negligent operation of those vehicles as inherent risks and that drivers are legislatively relieved of the duty of care to those passengers, they might conclude that such a defendant has already benefited from a legislatively applied concept of incurred risk and instruct the jury accordingly.

⁴⁰⁵That is, "express" or "implied," and "primary" or "secondary."

risk presents problems enough, but assumption of risk cases add the complication of attempts by the parties to regulate their conduct through contract. In some of those cases the parties will have addressed the riskiness of the activity involved in the transaction and will have attempted to allocate those risks between them. Suppose, for example, that *X* validly contracts with *Y* to receive the benefit of *Y*'s services. Part of the contract expressly relieves *Y* of a duty of ordinary care toward *X*. If the Comparative Fault Act includes all of assumed risk in the definition of "fault," application of the Act under the rubric of "fault" presents some problems if *X* is injured and reneges on the contract not to sue *Y*.

It is doubtful that the parties would agree in advance that *X* would take on a stated percentage of risk as "fault" or, if they had, would expect the trier of fact to be bound by that clause. Upon what other basis may a jury return a verdict that proclaims *X* assumed only a portion of the risk? Even if the jury is permitted to infer that the contract or some other factor permits a determination of the percentage of the risk that has been assumed, what is the conceptual basis for presuming that an assumption of *N*% of the risk is equivalent to an equal percentage of contributing fault? If *X* obtains a verdict against *Y*, does *Y* then have a breach of contract action against *X* for the amount of damages he was compelled to pay *X* in the tort claim, plus the cost of defending? If *X* knows of and appreciates a danger, and specifically contracts for a benefit in a way which addresses that danger, the common law-trained mind tends to rebel at the suggestion that *X*'s conduct amounts to fault. A contract against public policy is one thing; a valid, expressed release of duty is another. An unqualified inclusion of assumed risk in the definition would resurrect a duty the law and the parties themselves had previously declared extinguished.

The above problems aside, there remains the difficulty of requiring the jury to translate *X*'s contractual assumption of risk into the defendant's "fault." Assuming that they can do so, or at least act as if they can, a finding that the plaintiff is at "fault" does not compel the conclusion that the *defendant* is at fault. The statute does not purport to change the basis of liability, and the jury should not be permitted to assume that since the plaintiff is deemed to be something less than 100% at "fault" then the defendant must have been at "fault" for the remainder. The Act's suggested instructions require the jury to reach a verdict by multiplying the defendant's percentage of "fault" by the total amount of damages. Those instructions only imply that the jury is to determine the defendant's "fault" through independent evaluation. They do not explicitly prevent the jury from deducing that the defendant was at "fault" by assuming that whatever proportion of "fault" remaining after computing the plaintiff's contribution belongs to the defendant.⁴⁰⁶

⁴⁰⁶See *supra* text at 789 (first full paragraph).

We may not need to know precisely how juries perform their official duties. We probably cannot do otherwise but to trust them to do their best in accordance with their own understanding of the law and what is fair, and to believe that they will, within their peculiar combination of experiences, reach just decisions. Those observations are not satisfactory reasons to expect a jury to be able to translate a validly assumed risk into some artificial proportion of "fault." In asking a jury to evaluate human conduct and assign a judgment of "fault" to that conduct, we are asking its members to do more than simply decide whether a fact exists or not; we are asking them to evaluate those facts in accordance with what the law requires of their peers. This analysis has shown that the Indiana Act's definition of "fault" is imprecise, inconsistent, and thereby confusing in its declaration of what the new "fault" to be compared is. The ambivalence of the General Assembly toward the apportionment principle has crept into the definitions section, and will muddle application of the statute if not corrected by amendment or interpretation. A procedure that permits the jury to assign accountability on the basis of fault without assisting it in understanding the meaning of "fault" allows it to act without regard to law. A system which requires the jury to perform a transformation of fault and nonfault concepts into judgments of "fault" without guidance from fundamental principles of law invites confusion and frustration. Our system of tort law has long recognized more than one basis for accountability. The predominance of fault as one of those bases should not obscure the reasons for the creation and refinement of a nonfault basis. There are circumstances in our society where it is proper that a person be fully accountable for the injuries that have befallen him without reference to the faultiness of that person's conduct. The assumption of risk defenses have been a legal device for enforcing that responsibility. The fact that some courts in the past have not performed their tasks well in applying those defenses is not a good reason for discarding or transforming the defenses. The defenses should not be incorporated wholesale into comparative fault simply on the basis of a momentum established in moving toward the apportionment principle. The Indiana General Assembly has failed to pay heed to the common law development of the assumed risk defenses in this state. As a result, the Indiana Act fails to address those defenses with needed precision and consistency. As this discussion has demonstrated, adequate conceptual separation between the segments of assumed and incurred risk that "overlap" with fault and those that do not can be maintained. The areas of "overlap" should be subject to the apportionment principle. The areas that do not involve fault should be left out of comparative "fault."

IV. PLAINTIFF'S FAILURE TO EMPLOY SAFETY PRECAUTIONS AS
 "FAULT": THE DOCTRINE OF AVOIDABLE CONSEQUENCES
 AND THE SEAT BELT DEFENSE

Section two presents two phrases which raise the issue of whether the Act will permit defendants to invoke the apportionment principle by proving that the plaintiff failed to use an available safety device. The Act's definition of "fault" includes the "unreasonable failure to avoid an injury,"⁴⁰⁷ which could simply be interpreted as a breach of a duty to prevent harm. However, this interpretation would render the encompassing phrase redundant in light of the section's preceding phrase "any act or omission that is negligent."⁴⁰⁸ The former phrase, then, must carry a meaning different from primary or contributory negligence. The same phrase was included in the Uniform Act.⁴⁰⁹ The commissioners' commentary does not explicitly expand the phrase's meaning, but simply states: "The doctrine of avoidable consequences is expressly included in the coverage."⁴¹⁰ Because the phrase "unreasonable failure to avoid an injury" may be taken as the "express inclusion" of the doctrine of avoidable consequences,⁴¹¹ a strong inference arises that the Indiana Act has codified the doctrine. Accepting the inference that the Act has adopted the avoidable consequences doctrine, however, is not tantamount to accepting the suggestion that the Act recognizes the failure to employ safety devices as a defense invoking the apportionment principle. The seat belt defense, which has received most of the recent attention in the case law, will be the focus of this discussion, but the analysis would apply in other cases in which available safety precautions are not used.⁴¹²

⁴⁰⁷IND. CODE § 34-4-33-2(a) (Supp. 1984).

⁴⁰⁸*Id.*

⁴⁰⁹UNIF. COMPARATIVE FAULT ACT § 1(b), 12 U.L.A. 35, 37 (Supp. 1984) [hereinafter cited as UNIFORM ACT].

⁴¹⁰*Id.* commissioners' comment at 38.

⁴¹¹Although "unreasonable failure to avoid an injury" is not a precise statement of the doctrine, there is no other use of "avoid" in the Uniform Act's definitions section, so the "express inclusion" is taken to be that phrase.

⁴¹²In recent years, cases in which the plaintiff has failed to employ an available safety precaution or device such as automobile seatbelts or a motorcycle helmet have received much attention in discussion of the doctrine of avoidable consequences. See *Bond v. Jack*, 387 So. 2d 613 (La. Ct. App. 1980); *Rogers v. Frush*, 257 Md. 233, 262 A.2d 549 (1970); *Burgstahler v. Fox*, 290 Minn. 495, 186 N.W.2d 182 (1971); *Dean v. Holland*, 76 Misc. 2d 517, 350 N.Y.S.2d 859 (Sup. Ct. 1973); *Halvorson v. Voeller*, 336 N.W.2d 118 (N.D. 1983); *Brown v. Smith*, 604 S.W.2d 56 (Tenn. Ct. App. 1980). Cf. *O'Donnell v. United States*, 428 F. Supp. 629 (D. La. 1977). See generally Note, *Helmetless Motorcyclists—Easy Riders Facing Hard Facts: The Rise of the "Motorcycle Helmet Defense,"* 41 OHIO ST. L.J. 233 (1980). In such cases, the defendant argues that the plaintiff's failure at least aggravated the plaintiff's injury. See cases cited *infra* notes 416-47. See generally

The seat belt defense, which Indiana appellate courts have rejected,⁴¹³ has had mixed treatment in other jurisdictions. Under traditional contributory negligence analysis, the main problem in seat belt cases is that the defendant must prove that the plaintiff's faulty conduct caused or contributed to the injury-producing event. If the injury-producing event is viewed as the tortious contact caused by the defendant's conduct, the plaintiff's failure to use protective devices will rarely help produce that contact.⁴¹⁴ Even if the injury-producing event is viewed as the "second collision" of the plaintiff's body with the interior of the automobile or with some object after the plaintiff is thrown from a vehicle,⁴¹⁵ the defendant must, nevertheless, establish a duty to fasten seat belts and a breach of that duty. Courts have generally been reluctant to find such a duty.⁴¹⁶ Courts have offered the following reasons for this reluctance: (1) the jurisdiction's legislature does not impose the duty;⁴¹⁷ (2) the state law does not require seat belts in all vehicles;⁴¹⁸ (3) the efficacy of using seat belts is doubtful;⁴¹⁹ (4) the expert testimony needed to address the question of whether or not the plaintiff would have incurred the injuries if he had used a seat belt produces delay and expense in trials.⁴²⁰

To circumvent the courts' resistance to the contributory negligence theory, defendants, whose essential argument is that the plaintiff would have suffered injuries to a lesser degree had the seat belts been worn, have framed the seat defense in terms of the avoidable consequences doctrine. This doctrine⁴²¹ prevents the plaintiff from recovering damages that could reasonably have been avoided.⁴²² Usually the doctrine is invoked where the plaintiff, after incurring an injury, has refused or neglected to obtain treatment for an injury, and subsequently complains

Caiazzo v. Volkswagenwerk A.G., 647 F.2d 241 (2d Cir. 1981); Sullivan, *The Seat Belt Defense Should be Resurrected Under Pure Comparative Negligence*, 61 MICH. B.J. 560 (1982); Walker & Beck, *Seat Belts and the Second Accident*, 34 INS. COUNS. J. 352 (1969).

⁴¹³State v. Ingram, 427 N.E.2d 444 (Ind. 1981); Volkswagenwerk v. Watson, 181 Ind. App. 155, 390 N.E.2d 1082 (1979); Rhinebarger v. Mummert, 173 Ind. App. 34, 362 N.E.2d 184 (1977); Birdsong v. ITT Continental Baking Co., 160 Ind. App. 411, 312 N.E.2d 104 (1974); Kavanagh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1967).

⁴¹⁴E.g., Curry v. Moser, 89 A.D.2d 1, 454 N.Y.S.2d 311 (Sup. Ct. 1982).

⁴¹⁵Walker & Beck, *supra* note 412.

⁴¹⁶E.g., Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. Ct. 1967); Volkswagenwerk v. Watson, 181 Ind. App. 155, 390 N.E.2d 1082 (1979); Dziedzic v. St. John's Cleaners & Shirt Launderers, Inc., 53 N.J. 157, 249 A.2d 382 (1969). See also cases cited *infra* notes 417-19.

⁴¹⁷E.g., State v. Ingram, 427 N.E.2d 444 (Ind. 1981).

⁴¹⁸E.g., Derheim v. N. Fiorito Co., 80 Wash. 2d 161, 492 P.2d 1030 (1972).

⁴¹⁹E.g., Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977).

⁴²⁰E.g., *id.*; Derheim v. N. Fiorito Co., 80 Wash. 2d 161, 492 P.2d 1030 (1972).

⁴²¹The avoidable consequences doctrine is based on the principle that the law functions "not only to prevent and repair individual loss and injustice, but to protect and conserve the economic welfare and prosperity of the whole community." C. McCORMICK, DAMAGES 127 (1935).

⁴²²*Id.*; see also D. DOBBS, REMEDIES 186 (1973).

of the original injury plus the aggravation produced by the lack of treatment.⁴²³ More generally, the doctrine applies where the defendant's negligence exposes the plaintiff to a risk of injury, and the plaintiff fails to take reasonable steps to protect his interests.⁴²⁴

Defendants, seeking to draw an analogy between these situations and cases where the plaintiff did not wear seat belts, argue that the plaintiff could have reasonably avoided his injuries by doing so. A small number of jurisdictions have found the argument persuasive,⁴²⁵ but the argument has generally floundered upon the distinction that the doctrine of avoidable consequences is applicable to the plaintiff's conduct *after* the defendant's negligence has occurred.⁴²⁶ Two closely related principles bear on the courts' refusal to extend the avoidable consequences doctrine to seat belt cases: (1) reasonableness only requires the plaintiff to take self-protective action where there is knowledge of the facts requiring such action;⁴²⁷ and (2) a person need not take self-protective action in the face of a threatened future wrong.⁴²⁸ The weight of these principles, in addition to the reservations courts have expressed regarding the contributory negligence theory,⁴²⁹ have led courts to reject the avoidable consequences doctrine in seat belt cases. Consequently, the courts have deferred to the legislature for any change.⁴³⁰

Some courts view the admission of the seat belt defense as tantamount to an adoption of comparative negligence, and reject the defense when comparative negligence principles are not available.⁴³¹ With Indiana's adoption of comparative fault, therefore, one might argue that the

⁴²³See, W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 65, at 422-24 (4th ed. 1971), and cases cited therein.

⁴²⁴See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 22.10, at 1232 (1956).

⁴²⁵*Pritts v. Lowery Trucking*, 400 F. Supp. 867 (W.D. Pa. 1975); *Mount v. McClellan*, 91 Ill. App. 2d 1, 234 N.E.2d 329 (1968); *Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974); *Bentzler v. Braun*, 34 Wis. 2d 362, 149 N.W.2d 626 (1967) (failure to use seatbelt is question for jury, but defendant failed to produce evidence of causal connection between injuries and failure to wear seatbelts); see also *Halvorson v. Voeller*, 336 N.W.2d 118 (N.D. 1983) (failure to wear motorcycle helmet admissible to reduce damages so long as expert testimony available to show use of helmet would have lessened injuries).

⁴²⁶*E.g.*, *State v. Ingram*, 427 N.E.2d 444 (Ind. 1981). See generally W. PROSSER, *supra* note 423, § 65, at 423. Nevertheless, Dean Prosser equates contributory negligence and avoidable consequences. *Id.* at 424.

⁴²⁷D. DOBBS, *supra* note 422, at 188; C. MCCORMICK, *supra* note 421, at 140-41. Professor Dobbs suggests that this limitation is perhaps not quite equivalent to the objective knowledge standard in primary negligence theory, and that subjective attributes of the plaintiff may be considered more important in this context. Professor McCormick states the limitation more in terms of a traditional objective standard.

⁴²⁸C. MCCORMICK, *supra* note 421, at 137.

⁴²⁹See *supra* notes 417-20 and accompanying text.

⁴³⁰*E.g.*, *State v. Ingram*, 427 N.E.2d 444 (Ind. 1981).

⁴³¹*E.g.*, *Birdsong v. ITT Continental Baking Co.*, 160 Ind. App. 411, 312 N.E.2d 104 (1974); *Derheim v. N. Fiorito Co.*, 80 Wash.2d 161, 492 P.2d 1030 (1972).

legislature has admitted the seat belt and similar defenses. This proposition would, of course, require a second argument that the legislature either has established a duty to fasten seat belts, despite the common law refusal to recognize such a duty, or that the legislature has modified the doctrine of avoidable consequences, effectively overruling the judicial obstacles to its application.

The defendants' arguments are fraught with difficulties. First, there is the matter of establishing the failure to use a seat belt as fault.⁴³² While the Act's definition of "fault" has rather liberally incorporated concepts of liability which are not traditional notions of fault,⁴³³ the Act has not departed so far from those traditional notions as to create liability where none attached before. The defendants' argument would have to rely on the phrases "any act or omission that is negligent,"⁴³⁴ "unreasonable failure to avoid injury,"⁴³⁵ and "injury attributable to the claimant's contributory fault"⁴³⁶ to satisfy the court that a new duty to employ a safety precaution is raised by the Act. A duty raised by operation of statute is no stranger to the judicial mind,⁴³⁷ but the Comparative Fault Act hardly seems specific enough to establish a standard of conduct which provides foundation for an argument of a duty to wear seat belts, especially in light of the judicial refusal to find such a duty even with legislative requirements to have automobiles *equipped* with seat restraints.⁴³⁸

Even if the defendant overcomes the "duty" hurdle, the difficulty of establishing the causal connection required for apportionment remains. The Act specifically provides that "legal requirements of causal relation apply to . . . contributory fault,"⁴³⁹ and the jury is permitted to apportion only with respect to fault that has "contribut[ed] to cause the . . . loss."⁴⁴⁰ This language clearly indicates that the defendant must prove some causal connection between the plaintiff's "fault" and the injury

⁴³²Compare the approach of the courts in Illinois and North Dakota, which permit evidence of the omitted safety precaution to be admitted only on the issue of damages, and consider it irrelevant on the issue of liability. *E.g.*, *Wagner v. Zboncak*, 111 Ill. App. 3d 268, 443 N.E.2d 1085 (1982); *Halvorson v. Voeller*, 336 N.W.2d 118 (N.D. 1983).

⁴³³*See supra* text accompanying notes 35-49.

⁴³⁴IND. CODE § 34-4-33-2(a).

⁴³⁵*Id.*

⁴³⁶*Id.* § 34-4-33-3.

⁴³⁷*See generally* 2 F. HARPER AND F. JAMES, *supra* note 424, §§ 17.5-17.6; W. PROSSER, *supra* note 423, § 36; RESTATEMENT (SECOND) OF TORTS §§ 285, 286 (1965).

⁴³⁸*E.g.*, *Rhinebarger v. Mummert*, 173 Ind. App. 34, 362 N.E.2d 184 (1977) (Buchanan, J., concurring). *See generally* Leonard, *The Application of Criminal Legislation to Negligence Cases: A Reexamination*, 31 SANTA CLARA L. REV. 427 (1983).

⁴³⁹IND. CODE § 34-4-33-1(b).

⁴⁴⁰*Id.* § 34-4-33-5(a)(1). This discussion of proof of causation does not contradict prior assertions that percentages should not be calculated by comparison of contributions to causation. *See supra* text accompanying notes 51-54.

which the defendant would attribute to that "fault."⁴⁴¹ The defendant may be able to present evidence of the extent to which the plaintiff's omission aggravated the injuries. However, if experts are required, the defendant faces the hurdle of convincing the courts that the additional delay and expense of such testimony are necessary costs as a matter of policy.⁴⁴²

A second approach holds little hope for defense counsel. This argument proceeds on the premise that the Act expands the avoidable consequences doctrine and, in that expanded form, overcomes the judicial refusal to adopt the seat belt defense. This argument's support rests on the mere fact that the Act's language is different from "avoidable consequences." Since the word "injury" seems more specific than "consequences," the defendant might contend that the use of such specificity in the phrase "avoid an injury" is evidence that the legislature contemplated seat belt cases when it chose the phrase. Had the legislature intended to merely codify the common law rule, it would have used the phrase "avoidable consequences." The defendant would argue that the legislature's choice of different language indicates its intent to overrule restrictive judicial applications of the avoidable consequences doctrine. Failure to fasten one's seat belts would be characterized as a precise "failure to avoid an injury." The defendant could further appeal to the inherent policy of fairness in the apportionment principle, arguing that defendants should not bear the entire cost of the plaintiff's injuries in light of the Act's policy of dividing the responsibility for injuries caused by multiple acts.

Two considerations, however, substantially weaken the foregoing argument's persuasive merit. First, the phrase "failure to avoid an injury" is borrowed from the Uniform Act, and the commissioners "expressly included" the doctrine of avoidable consequences.⁴⁴³ Second, the argument based upon "specific" terms is susceptible to its own logic, considering the legislature's specific inclusion of other defenses.⁴⁴⁴ A forceful counterargument is that had the legislature contemplated the safety precaution cases when it was framing the concept of "fault," it could have and would have inserted more descriptive terminology.

⁴⁴¹The commissioners' commentary refers to a seat belt defense in a discussion of causation, not a discussion of "failure to avoid an injury." *UNIFORM ACT*, *supra* note 409, at 38. This reference, however, fortifies the position that a defendant must prove that causal connection if the seat belt defense is recognized.

⁴⁴²*See Franklin v. Gibson*, 138 Cal. App. 3d 340, 188 Cal. Rptr. 23 (1982); *Halvorson v. Voeller*, 336 N.W.2d 118 (N.D. 1983).

⁴⁴³*See supra* note 410.

⁴⁴⁴The legislature appended "incurred risk" to the phrase "unreasonable assumption of risk not constituting an enforceable express consent." There may be some doubt about what the General Assembly intended to accomplish by these phrases, *see supra* notes 306-406 and accompanying text, but the use of common law terminology for defenses makes clear the reference to specific defenses.

Even if the defendant's argument survives the duty, causation, and legislative intent hurdles, the defendant's battle is not won. Since the phrases upon which the defendant must rely require that the failure to avoid an injury be "unreasonable,"⁴⁴⁵ at the very least, defense counsel is precluded from contending that failure to fasten seat belts is "fault" per se. Furthermore, the commissioners' commentary suggests that jurisdictions should state that "[t]his rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines."⁴⁴⁶ The argument that the Indiana Act legislatively overrules the common law doctrine suffers greatly from the omission of that suggested clause.

The leading seat belt defense case in Indiana, *Kavanagh v. Butorac*,⁴⁴⁷ recognized some merit in the avoidable consequences argument, but found no authority for expanding the doctrine. The court recognized "the possibility of the doctrine applying in some future date."⁴⁴⁸ Without some modification of the present language of the Comparative Fault Act, however, defendants face a nearly insurmountable task of providing that authority. Consequently, the "future date" of the availability of the seat belt defense likely remains a matter of prophesy.

V. SOME IMPORTANT OMISSIONS

A. Set-Off of Counterclaims

1. *Effects of Compulsory Set-Off.*—Suppose that the plaintiff and the defendant are traveling at the same rate of speed in their respective automobiles on different streets. Those streets run perpendicular to each other and at their intersection there is a four-way stop. The plaintiff arrives at the intersection at the same time as the defendant and both fail to heed the warnings to stop. Both drivers sustain property damage and personal injury to the extent of \$10,000 from the collision. The defendant responds to the plaintiff's comparative fault action with a counterclaim. As might be expected, the jury finds that each has been injured in the amount of \$10,000 and that each is 50% at "fault." Each then receives a verdict for \$5,000 against the other. In the abstract, the obligations cancel each other out; payment of the judgment by each would mean that both parties' assets would be depleted by \$5,000 and both sets of assets would be replenished by the same amount. If the law of comparative fault takes cognizance of this theoretical cancellation and allows the principle of set-off to operate, each party will collect nothing and the law will in effect leave the parties where it found them.

However, the abstract situation rarely presents itself in the courtroom.

⁴⁴⁵IND. CODE § 34-4-33-2(a).

⁴⁴⁶UNIFORM ACT, *supra* note 409, at 38.

⁴⁴⁷140 Ind. App. 139, 221 N.E.2d 824 (1967).

⁴⁴⁸*Id.* at 149, 221 N.E.2d at 830.

It is far more likely that each of the parties will have obtained some sort of liability insurance coverage. If setoff is required, the parties collect nothing, are left to their own devices, and their insurers will have realized a windfall in the sum of the cancelled obligations plus the premiums paid on the policies. The result falls far short of the objective of the comparative fault system to provide even partially at fault actors at least some compensation for their injuries. Principles of fairness and individual responsibility are extremely important elements in the comparative fault system's refinement of the compensation function of tort law. A more precise adjustment of tort disputes to fashion a remedy which better reflects the parties' contributions of fault than was possible under prior law is the fundamental aim of the system. By adopting the system, the Indiana General Assembly has moved the law of this state at least a step away from gross, one-sided, albeit easier, methods of adjusting torts disputes. If set-off is to be automatically required in real cases like the hypothetical, the system will have literally set part of itself against another to produce gross, one-sided results that benefit neither of the injured parties. If the objectives of the liability insurance system are limited to providing a tortfeasor, at a fair cost of premiums, some security against the injurious consequences of her inadvertent acts, set-off produces no difficulty in cases like the hypothetical. The opposing party's fault, in effect, prevents him from burdening the insured's financial integrity with a claim. However, if the insurance system is supposed to provide those exposed to the risks of others' inadvertent acts with some assurance of a financially responsible entity to look to for compensation,⁴⁴⁹ then a set-off requirement is dysfunctional. Only the insurance industry benefits, and at the expense of the people who have relied upon it for protection.

The hypothetical posing this question should not be lightly dismissed. It may well present unusual circumstances to establish a point, but other circumstances in which the parties could be found equally at fault will not occur so rarely, and the issue of set-off will inevitably arise. The Indiana Act confers considerable power upon juries to apportion fault without a great deal of controlling criteria, and it is not farfetched to expect a jury to "split it down the middle" in a difficult case. Furthermore, although the probability of a case arising where the parties suffer equal damages is low, one in which both suffer some injury will

⁴⁴⁹The widespread enactment of financial responsibility laws may be some evidence of the policy of providing protection for accident victims, though not *necessarily* through the medium of insurance. Several courts have expressed the policy in the context of entertaining direct actions by injured parties against insurance carriers. See, e.g., *Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969). See also 8 J. APPLEMAN & J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4862, at 571-78 (1981) and cases cited therein. Yet, the recognition of such a public policy need not be viewed as dependent upon the right of direct action by injured parties. See *Odolecki v. Hartford Accident & Indem. Co.*, 55 N.J. 542, 264 A.2d 38 (1970).

not be so rare, and the latter case presents as serious an issue. Various combinations of the presence and amount of insurance coverage compound the matter. The failure of the General Assembly to provide a clear statement of public policy to guide the courts in adjusting disputes in cases posing these issues is a serious omission in the Act.

2. *Effects of Prohibited Set-off.*—Differences in the parties' insurance coverage or ability to pay a judgment complicates set-off problems. In the hypothetical just posed, suppose further that the plaintiff has full insurance coverage and the defendant has none. In this situation, the wisdom of a *prohibition* of set-off is drawn into question. If set-off is not permitted, the uninsured defendant collects her judgment in full and plaintiff must rely upon the uninsured motorist coverage, if any, in his own policy if defendant is insolvent. However, to the extent that the plaintiff is able to obtain satisfaction of his judgment by levying upon the policy proceeds just paid to defendant, the prohibited set-off proposition has something to recommend it over the required set-off proposition.⁴⁵⁰ At least the person who has prepared for the financial setback of tortious injuries will be able to realize some protection stemming from that preparation. Nevertheless, certain efficiencies will have been lost by requiring the plaintiff to pay, then levy upon, the monies generated by his policy of insurance.

3. *Problems of a One-Way Rule in Multiple Party Cases.*—As the number of parties increase and the features of cases multiply with different combinations of counterclaims, amounts of damage incurred, and presence or nonpresence of insurance, distortions of the apportionment principle and allocations of financial burden not in keeping with the objectives of the fault insurance system can result under either a required or a prohibited set-off rule. As a background for later discussion of possible solutions, this section will illustrate how these one-way rules give rise to problems. Consider first a relatively simple situation: *P* sues *A* and *B*; *A* counterclaims against *P* and *B*; and *B* counterclaims against *P* and *A*. The jury finds *P* to be 35% at "fault," *A* 25%, and *B* 40%. Each party's damages before apportionment are \$10,000. Since no party's "fault" is greater than 50% of the "total fault of all the parties," each obtains a verdict against the others and each is subject to a verdict obtained by the others.⁴⁵¹ The obligations resulting from the findings are represented graphically:

⁴⁵⁰See *Jess v. Herrmann*, 26 Cal. 3d 131, 141 n.5, 604 P.2d 208, 213 n.5, 161 Cal. Rptr. 87, 92 n.5 (1979).

⁴⁵¹A more graphic representation helps to hold the situation more clearly in mind.

Jury finds:

P- 35% at "fault"; \$10,000 damages

A- 25% at "fault"; \$10,000 damages

B- 40% at "fault"; \$10,000 damages

Results of Verdict:

P entitled to receive \$2,500 from *A*, but owes *A* \$3,500

Figure #1

Party and % of Fault	Unadjusted Damages	Verdicts
<i>P</i> (35%)	\$10,000	\$2,500 against <i>A</i> 4,000 against <i>B</i>
<i>A</i> (25%)	\$10,000	\$3,500 against <i>P</i> 4,000 against <i>B</i>
<i>B</i> (40%)	\$10,000	\$3,500 against <i>P</i> 2,500 against <i>A</i>

If set-off applies, each situation would be considered separately: *P* pays *A* the difference between the judgment he obtained against *A* and the judgment *A* obtained against him, or \$1,000; *A* receives from *B* the difference between the judgments relating to her and *B*, or \$1,500; and *B* pays the difference between the judgments relating to him and *P*, or \$500. The net “recovery” for each would then be: *P*: negative \$500; *A*: \$2,500; and *B*: negative \$2,000.

Added to the chart, the results are shown in this manner:

P entitled to receive \$4,000 from *B*, but owes *B* \$3,500
P’s receipts \$6,500; payouts \$7,000 = (\$500) net loss
A entitled to receive \$3,500 from *P*, but owes *P* \$2,500
A entitled to receive \$4,000 from *B*, but owes *B* \$2,500
A’s receipts \$7,500; payouts \$5,000 = \$2,500 net recovery
B entitled to receive \$3,500 from *P*, but owes *P* \$4,000
B entitled to receive \$2,500 from *A*, but owes *A* \$4,000
B’s receipts \$6,000; payouts \$8,000 = (\$2,000) net loss.

Figure #2

COMPULSORY SET-OFF RULE

Party and % of Fault	Unadjusted Damages	Verdicts	Total Obligations	Results of Set-Off	Net Recovery
<i>P</i> (35%)	\$10,000	\$2,500 against <i>A</i> 4,000 against <i>B</i>	\$7,000	Pay \$1,000 to <i>A</i> Receive \$500 from <i>B</i>	(\$500)
<i>A</i> (25%)	\$10,000	\$3,500 against <i>P</i> 4,000 against <i>B</i>	\$5,000	Receive \$1,000 from <i>P</i> Receive \$1,500 from <i>B</i>	\$2,500
<i>B</i> (40%)	\$10,000	\$2,500 against <i>A</i> 3,500 against <i>P</i>	\$8,000	Pay \$1,500 to <i>A</i> Pay \$500 to <i>P</i>	(\$2,000)
TOTALS	Injuries: \$30,000	Liability: \$20,000	\$20,000	Actual Pay Out: \$3,000 (10% of total injury)	-0-

The fact that *B* comes away with nothing and must carry 66.6% of the total actual payout may seem harsh in view of the aims of the comparative fault system and the fact that he was well under the 50% contributory negligence threshold. On the other hand, he has been spared the additional \$6,000 outlay which he would have been required to make if set-off had been prohibited. Even so, *B* may still prefer the no set-off approach if given the choice. That would be true in the case where, because of injuries or otherwise, *B* was experiencing cash flow difficulties. To the extent that he would have the flexibility to adjust his payout schedule with *P* and *A*, the proceeds of judgments received from *P* and *A* might relieve the cash flow problems in order to avoid catastrophe. At least he has the flexibility to try to work something out. Under the set-off rule he would have no choice but to pay out the additional \$2,000 from his already severely depleted assets. The point here is that a set-off requirement tends to be overly rigid and works against the principle of comparative fault under some circumstances by distorting the apportionment of compensation. Under these facts the shift in actual liability has been in favor of *A*, who is the least "faulty" of the three, and at the greatest expense of *B*, who is the most "faulty." However, the shift is disproportionate to their relative shares of fault.

When full insurance coverage is added to the multiparty hypothetical, the misallocation effect of set-off is highlighted. For a total liability of \$20,000, only \$3,000 will actually be required to be paid out. Considered in this light, the \$17,000 savings to the insurance carriers has come at the expense of undercompensating three people who had contracted with each of their carriers to relieve them of the financial burdens of injurious accidents.

In a case with one party uninsured, a prohibition upon set-off creates similar misallocation. The various results produced under the hypothetical facts are illustrated in the chart below. The uninsured party receives the full benefit of liability insurance coverage by the insured parties, and the insured parties are left to their own devices to obtain satisfaction of the uninsured party's obligation to them. If the proceeds of the insured parties' policies paid to the uninsured party are subject to attachment, then some of the funds made available by their own insurance planning will be accessible to the two other injured parties. However, since this would amount to a nullification of the prohibition of set-off, and would place an additional burden upon judicial processes, it offers nothing to recommend it over a requirement of set-off in the original proceeding.

Figure #3
PROHIBITED SET-OFF WITH ONE UNINSURED PARTY

Party and % of Fault	<i>P</i> (35%)	<i>A</i> (25%)	<i>B</i> (40%)
Unadjusted Damages	\$10,000	\$10,000	\$10,000
Verdicts	\$2,500 against <i>A</i> \$4,000 against <i>B</i>	\$3,500 against <i>P</i> \$4,000 against <i>B</i>	\$7,500 against <i>A</i> \$3,500 against <i>P</i>
Insurance Coverage (1)	\$10,000	-0-	\$10,000
Receipts	0 from <i>A</i> \$4,000 from <i>B</i>	\$3,500 from <i>P</i> \$4,000 from <i>B</i>	0 from <i>A</i> \$3,500 from <i>P</i>
Payouts	\$7,000 (46.6%)	-0-	\$8,000 (53.3%)
Net Recovery	(\$3,000)	\$7,500	(\$4,500)
Insurance Coverage (2)	-0-	\$10,000	\$10,000
Receipts	\$2,500 from <i>A</i> \$4,000 from <i>B</i>	0 from <i>P</i> \$4,000 from <i>B</i>	\$2,500 from <i>A</i> 0 from <i>P</i>
Payouts	-0-	\$5,000 (38.5%)	\$8,000 (61.5%)
Net Recovery	\$6,500	(\$1,000)	(\$5,500)
Insurance Coverage (3)	\$10,000	\$10,000	-0-
Receipts	\$2,500 from <i>A</i> 0 from <i>B</i>	\$3,500 from <i>P</i> 0 from <i>B</i>	\$2,500 from <i>A</i> \$3,500 from <i>P</i>
Payouts	\$7,000 (58.3%)	\$5,000 (41.6%)	-0-
Net Recovery	(\$4,500)	(\$1,500)	\$6,000

Still another problem is the matter of *under*-ability to pay. To keep this as simple as possible, the discussion will return to a two-party hypothetical. In this set of facts, assume that the plaintiff is injured to the extent of \$100,000 and the defendant incurs \$60,000 worth of harm. They are found equally at fault. The plaintiff's obligation to defendant would then be \$30,000, and the defendant's obligation to plaintiff would be \$50,000. Here, however, the plaintiff carries \$35,000 worth of insurance and the defendant is insured to a maximum of only \$25,000 and cannot pay any excess liability.

If a prohibition of set-off applies to these facts, only one party's claim is fully compensated, while the other receives only 50% of his claim.⁴⁵² More than 90% of the monetary resources available for compensation are utilized, but in a disproportionate manner, if the factors of equal fault and unequal preparedness for liability are taken into account. The chart below illustrates the results.

⁴⁵²That is, plaintiff's carrier pays defendant \$30,000, thereby fully discharging plaintiff's liability to defendant. Defendant's carrier pays the \$25,000 policy limits to plaintiff, discharging 50% of the obligation. Since \$60,000 worth of liability coverage was available, 91.66% of the protection funds available will have been expended.

Figure #4

PROHIBITED SET-OFF WITH UNDERINSURED PARTY

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Payment Received	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$100,000	\$50,000	\$30,000	\$35,000	\$25,000	-0-	50%	85.7%
<i>D</i> (50%)	\$60,000	\$30,000	\$50,000	\$25,000	\$30,000	\$25,000	100%	100%
TOTALS	\$160,000	\$80,000	\$80,000	\$60,000	\$55,000	\$25,000	68.75%	91.66%

As in the uninsured party situation, the prohibited set-off rule permits the underinsured party to receive full recovery from the adequately covered party's insurance resources, while the adequately covered party is limited to the amount of insurance protection purchased by the other party. Such may be the vicissitudes of modern life, but clearly there is no incentive for those who create risks of injury in society, and for those whose resources are inadequate to pay liability in excess of insurance coverage, to maximize their insurance protection.

From the hypothetical insurance carriers' standpoint, a required set-off rule works a little better. The system actually brings the parties' ultimate liability within the range of insurance coverage by performing the set-off operation prior to determining the respective obligations. In this sense, the set-off rule will technically solve the under-insurance problem. From the standpoint of parties equally at fault, and with the objective of utilizing available insurance resources, however, the set-off rule is much worse than a prohibition upon set-off. As the chart below illustrates, only one-third of the resources which could be committed to compensation are expended, and only one party receives them. This system requires the hypothetical defendant to pay \$20,000, and allows her to recover nothing.

Figure #5

REQUIRED SET-OFF WITH UNDERINSURED PARTY

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Payment Received After Set-Off	Obligation Remaining	% of Verdict Recovered	% of Insurance Resource Expended
<i>P</i> (50%)	\$100,000	\$50,000	\$30,000	\$35,000	\$20,000	-0-	40%	-0-
<i>D</i> (50%)	\$60,000	\$30,000	\$50,000	\$25,000	-0-	-0-	-0-	80%
TOTALS	\$160,000	\$80,000	\$80,000	\$60,000	\$20,000	-0-	25%	33.33%

4. *Alternatives to the One-Way Rules.—a. A lesser-injured pays greater-injured system.*—Several methods of addressing the illustrated problems are feasible. The relative merits of each vary according to the public policy and objectives emphasized in the system. For example, if compensating the most seriously injured party is the prime concern in the system, the law might require the lesser-injured party to pay the greater-injured, using whatever resources were available until those resources were exhausted or the claim was discharged. To implement such an approach, the system would require the payment of the proceeds of both parties' insurance into court and allocate those proceeds according to an equitable principle of lesser-injured pays greater-injured.

Using the same hypothetical facts as in the last set of illustrations, the system would work in the following manner. Plaintiff's carrier would pay \$30,000 into the court to cover the liability of plaintiff to defendant, and defendant's insurance carrier would do the same with defendant's \$25,000 policy to cover the judgment debt. A total of \$55,000 in compensation resources is thereby made available to the court for the purpose of equitable allocation. Under the guiding principle of this system, the plaintiff obtains full compensation and the defendant receives \$5,000 toward her injury. It utilizes the same proportion of resources as the no-set-off rule, and allocates those resources "better" than the set-off rule in the sense that the person with the greater injury is compensated first.

Figure #6

EQUITABLE ALLOCATION ACCORDING TO LESSER-INJURED PAYS GREATER-INJURED
PRINCIPLE—ONE PARTY UNDERINSURED

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$100,000	\$50,000	\$30,000	\$35,000	30,000	\$50,000	-0-	100%	85.7%
<i>D</i> (50%)	\$60,000	\$30,000	\$50,000	\$25,000	\$25,000	\$5,000	-0-	16.66%	100%
TOTALS	\$160,000	\$80,000	\$80,000	\$60,000	\$55,000	\$55,000	-0-	68.75%	91.66%

However, the allocation is more disproportionate than the no set-off rule, and while it happens in this case to put the heaviest burden on the lesser-injured *and* lesser-prepared party, the burden does not necessarily follow from the latter factor.⁴⁵³ If some incentive toward adequate financial responsibility is a strong policy in the jurisdiction, and is desired in the compensation system, this method would not be attractive.

b. *A lesser-prepared pays greater-prepared system.*—A policy which emphasizes financial responsibility might give primacy to an equitable principle which requires the lesser-prepared tortfeasor to bear the greater burden of allocation. Such a system would require, as in the previous alternative, the parties to pay the proceeds of insurance into court prior to allocation of recovery amounts. Under the facts of this discussion's hypothetical, an allocation in accordance with a principle of lesser-prepared pays greater-prepared produces the same results as the system previously illustrated.⁴⁵⁴ If the injuries happened to be reversed, and the magnitude of preparedness is considered to be a matter of proportion of actual liability covered by insurance, the matter of who is the lesser-prepared becomes a closer question, and illustrates the weakness of the principle. "Lesser-" and "greater-prepared" are determined by reference to the magnitude of the injury. Since that factor is a mere fortuity, there may be some incentive to insure to the maximum, but there is also a temptation to hedge, on the hope that the other party will be the "lesser-insured." Furthermore, a major misallocation results at any rate. This alternative system requires some rather significant tradeoffs in order to give primacy to its driving principle. A system which would be able to address more than one concern at a time would be more attractive than either alternative considered thus far.

c. *The Uniform Comparative Fault Act's system.*—The Commissioners on Uniform State Laws have attempted to develop a system which purports to take into account the elements of obligation and ability to meet the obligation. The Uniform Act imposes a prohibition upon set-off, and provides for a court distribution upon motion of one of the parties.⁴⁵⁵ The commentary to that section sets out several illustrations involving various combinations of proportions of fault, amounts of injury, and availability of insurance to guide adopting jurisdictions

⁴⁵³That is, if defendant remained the most thinly covered, but happened to have incurred the larger amount of injuries, the burden would be borne by plaintiff, the party most prepared (defendant received \$30,000 and plaintiff gets \$25,000 as before).

⁴⁵⁴Illustrated graphically:

Plaintiff (most prepared) pays \$30,000 policy proceeds into court. Defendant (least prepared) pays \$25,000 policy proceeds into court. Plaintiff's claim of \$50,000 is satisfied first.

Defendant receives remaining \$5,000.

⁴⁵⁵UNIF. COMPARATIVE FAULT ACT § 3, 12 U.L.A. 35, 41 (Supp. 1984). [hereinafter cited UNIFORM ACT]. That section provides:

in the allocations of compensation resources. The illustrations are framed in terms of the "pure" system of comparative fault, however, and under a "modified" system would not give rise to the set-off issue because in each illustration one party's "fault" is greater than 50%.

However, one illustration in the commissioners' commentary sets out a formula applicable where both parties are under-insured which might be applied in a "greater than 50% rule" jurisdiction. That formula is " $D = C - O + P$,"⁴⁵⁶ where D equals the amount to be distributed to a party; C equals the amount of a party's claim after reduction by the fault percentage; O equals the amount owed to the other party; and P equals the amount paid into court. Applying the formula to our hypothetical, in the plaintiff's case, C would equal \$50,000, and O would equal \$30,000. Performing the operation of the formula would produce \$20,000 as a function of C minus O . Adding the \$30,000 liability insurance coverage paid into court to that figure produces a value for D of \$50,000. Defendant's distribution amount would be $(\$30,000 - \$50,000 + \$25,000) = \$5,000$. That, of course, is the same distribution produced in the example based upon the lesser-injured pays the greater-injured principle. If the injuries were reversed, however, the distributions would be

Plaintiff: $(\$30,000 - \$50,000 + \$35,000) = \$15,000$

Defendant: $(\$50,000 - \$30,000 + \$25,000) = \$45,000$

After these figures are inserted into the chart being used for illustrative purposes, the system produces these results:

A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to him by the other party.

⁴⁵⁶*Id.* commissioners' comment, illustration No. 8, at 42.

Figure #7

EQUITABLE ALLOCATION ACCORDING TO THE UNIFORM ACT'S SYSTEM
(AMOUNT OF INJURIES REVERSED)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$60,000	\$30,000	\$50,000	\$35,000	35,000	\$15,000	-0-	50%	100%
<i>D</i> (50%)	\$100,000	\$50,000	\$30,000	\$25,000	\$25,000	\$45,000	-0-	90%	100%
TOTALS	\$160,000	\$80,000	\$80,000	\$60,000	\$60,000	\$60,000	-0-	75%	100%

In this setting, the formula appears to work somewhat better than a straight set-off rule, but somewhat worse than a straight prohibition of set-off, in terms of relative proportions of compensation recovered.⁴⁵⁷ The formula seems to be skewed in favor of the lesser-injured pays greater-injured principle and provides little incentive for financial responsibility.

This effect can be best illustrated in the context of one party being *uninsured*. For example, assume that the defendant in the hypothetical carried no insurance. Applying the formula produces this result:

Plaintiff: $(\$50,000 - \$30,000 + \$30,000) = \$50,000$

Defendant: $(\$30,000 - \$50,000 + 0) = (\$20,000)$

The negative figure produced for the defendant denotes a continuing obligation in the plaintiff's favor in that amount, and will correspond with the figure reached by subtracting the amount of insurance proceeds paid into court by the plaintiff from the amount of the plaintiff's allocation.⁴⁵⁸ The results are charted below:

⁴⁵⁷This criticism in comparison to the straight no set-off rule would not apply in the case where the defendant (with the \$50,000 claim) was uninsured and unable to pay. The straight no set-off rule would allow the defendant to recover her full \$30,000 claim, while the plaintiff would be required to execute upon the insurance proceeds to get anything at all. Applying the formula, the court would award the plaintiff \$15,000 and the defendant \$20,000. The formula works a little better in this circumstance, but it is nevertheless closely tied to the least-injured pays most-injured principle, and some distortion thereby results.

⁴⁵⁸The commissioners' commentary states that the figure "corresponds with a number larger by that figure than the amount of deposit with the court" As can be seen by the example presented in this discussion, the statement by the commissioners is incomplete. *UNIFORM ACT*, *supra* note 455, at 42.

Figure #8

EQUITABLE ALLOCATION ACCORDING TO THE UNIFORM ACT'S SYSTEM (UNINSURED PARTY)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$100,000	\$50,000	\$30,000	\$35,000	30,000	\$30,000	-0-	60%	100%
<i>D</i> (50%)	\$60,000	\$30,000	\$50,000	-0-	-0-	-0-	\$20,000	-0-	-0-
TOTALS	\$160,000	\$80,000	\$80,000	\$35,000	\$30,000	\$30,000	\$20,000	37.5%	100%

If the plaintiff is the uninsured party, the formula produces this result:

Plaintiff: $(\$50,000 - \$30,000 + 0) = \$20,000$

Defendant: $(\$30,000 - \$50,000 + \$25,000) = \$5,000$

Charted, the results are:

Figure #9

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$100,000	\$50,000	\$30,000	-0-	-0-	\$20,000	-0-	40%	-0-
<i>D</i> (50%)	\$60,000	\$30,000	\$50,000	\$25,000	\$25,000	\$5,000	-0-	16.66%	100%
TOTALS	\$160,000	\$80,000	\$80,000	\$25,000	\$25,000	\$25,000	-0-	31.25%	100%

If the injuries were reversed the formula produces the following results:

- (1) Defendant with no insurance:
Plaintiff: $(\$30,000 - \$50,000 + \$35,000) = \$15,000$
Defendant: $(\$50,000 - \$30,000 + 0) = \$20,000$
- (2) Plaintiff with no insurance:
Plaintiff: $(\$30,000 - \$50,000 + 0) = \$20,000$
Defendant: $(\$50,000 - \$30,000 + \$25,000) = \$45,000$

Placed in the charts, the allocation looks like this:

Figure #10

(1) Defendant with no insurance:

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$60,000	\$30,000	\$50,000	\$35,000	\$35,000	\$15,000	-0-	50%	100%
<i>D</i> (50%)	\$100,000	\$50,000	\$30,000	-0-	-0-	\$20,000	-0-	40%	-0-
TOTALS	\$160,000	\$80,000	\$80,000	\$35,000	\$35,000	\$35,000	-0-	43.75%	100%

Figure #11

(2) Plaintiff with no insurance:

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$60,000	\$30,000	\$50,000	-0-	-0-	-0-	\$20,000	-0-	-0-
<i>D</i> (50%)	\$100,000	\$50,000	\$30,000	\$25,000	\$25,000	\$25,000	-0-	50%	100%
TOTALS	\$160,000	\$80,000	\$80,000	\$25,000	\$25,000	\$25,000	\$20,000	31.25%	100%

Clearly, some incentive is present to obtain some insurance protection, since the allocation takes not only uninsured but also under-insured parties into account. However, with one exception, the incentive is wholly subordinated to the lesser-injured pays greater-injured principle so long as *one* of the parties has some insurance protection. Interestingly, the only time the incentive is not subordinated to the latter principle is when the lesser-injured also has sufficient coverage to produce a surplus over the amount of the allocation for the greater-injured.

d. An "equal-division" system: variation one.—Another approach might not give primacy to either of the principles behind the systems discussed above. Instead, this alternative would take into account the parties' *collective* ability to compensate for injuries they cause, and would permit an equitable division of those resources. This system of allocation would have reference to the equal fault of the parties. One variation would be simply to require the parties to share equally in the compensation resources to the extent of their claims or the sum of those resources. Thus, where plaintiff had \$30,000 worth of insurance coverage available and defendant had \$25,000, each would receive \$27,500 in the distribution. This "equal-division" method could produce some disproportion in allocation relative to the parties' respective injuries, but it also produces a stronger incentive than the above systems for financial responsibility. Each party would know in advance of an accident that if they elect to go partially uncovered, recovery will assuredly be less than it would be under full coverage. If the incentive were strong enough to induce full coverage for both parties, the misallocation relative to the size of injury would disappear. However, since the lesser-prepared pays greater-prepared principle is not part of the system, an uninsured party benefits from the adequately prepared party's financial responsibility. That effect may be tempered somewhat by judicial refusal to discharge the more responsible party's claim against the unprepared party, but in the case of an insolvent party, little protection would actually result. Nevertheless, the system is uncomplicated and simple to administer, and its simplicity may outweigh its disadvantages.⁴⁵⁹

The results of this system are shown below in chart form in Figures #12 and 13 for comparison with the other systems discussed.

⁴⁵⁹The system also works for cases involving multiple parties and unequal fault. See the chart on page 824, *infra*.

EQUITABLE ALLOCATION ACCORDING TO EQUAL DIVISION OF
COMPENSATION RESOURCES:
VARIATION ONE—MULTIPLE PARTY—UNEQUAL FAULT CASE

Party and % of Fault	Injury	Verdict Against Party One	Verdict Against Party Two	Total Obligation To Other Parties	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received After Allocation	Obligation Remaining (Party)	% of Verdict Recovered	% of Insurance Proceeds Expended
<i>P</i> (35%)	100,000	<i>A</i> - 25,000	<i>B</i> - 40,000	45,500	25,000 (per person)	45,500	60,000	—	92.3%	100%
<i>A</i> (25%)	60,000	<i>P</i> - 21,000	<i>B</i> - 24,000	42,500	30,000 (per person)	42,500	45,000	—	100%	100%
<i>B</i> (40%)	70,000	<i>P</i> - 24,500	<i>A</i> - 17,500	64,000	35,000 (per person)	59,000	42,000	5,000 (<i>P</i>)	100%	100%
TOTALS	230,000	70,500	81,500	152,000	180,000	147,000	147,000	—	96.7%	100%

Equal division of the \$147,500 insurance proceeds produces a figure of \$49,166.66 per party. Since *A*'s and *B*'s claims are less than that amount, their claims are paid in full and the excess is returned to the pool of funds for reallocation to *P*. Since that reallocation does not fully satisfy *P*'s claim, the obligation from *B* to *P*, who was not fully insured, may be permitted to remain open by the court.

Figure #12
EQUITABLE ALLOCATION ACCORDING TO EQUAL DIVISION OF COMPENSATION RESOURCES:
VARIATION ONE

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$100,000	\$50,000	\$30,000	\$35,000	30,000	\$27,500	-0-	55%	100%
<i>D</i> (50%)	\$60,000	\$30,000	\$50,000	\$25,000	\$25,000	\$27,500	\$22,500	91.66%	100%
TOTALS	\$160,000	\$80,000	\$80,000	\$60,000	\$55,000	\$55,000	\$22,500	68.75%	100%

Figure #13

EQUITABLE ALLOCATION ACCORDING TO EQUAL DIVISION OF COMPENSATION RESOURCES:
VARIATION ONE (INJURIES REVERSED)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$60,000	\$30,000	\$50,000	\$35,000	\$35,000	\$30,000	\$20,000	100%	100%
<i>D</i> (50%)	\$100,000	\$50,000	\$30,000	\$25,000	\$25,000	\$30,000	-0-	60%	100%
TOTALS	\$160,000	\$80,000	\$80,000	\$60,000	\$60,000	\$60,000	\$20,000	75%	100%

Comparison with the other systems shows that, with respect to total percentage of verdict recovered, the system performs as well as any of the previously discussed alternatives and as well as any system might hope, given compensation resources amounting to only 75% of the total obligation. This alternative actually performs slightly better than the Uniform Act's formula when individual percentages of verdicts recovered are compared. However, since the equitable allocation method does not include an adjustment factor for lack of financial responsibility, the presence of an uninsured party produces significant differences in result which may not be desirable. Compare the charted results below with the allocations in previously discussed alternatives:

Figure #14

EQUITABLE ALLOCATION ACCORDING TO EQUAL DIVISION OF COMPENSATION RESOURCES:
VARIATION ONE (DEFENDANT UNINSURED)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$100,000	\$50,000	\$30,000	\$35,000	30,000	\$15,000	-0-	30%	100%
<i>D</i> (50%)	\$60,000	\$30,000	\$50,000	-0-	-0-	\$15,000	\$35,000	50%	-0-
TOTALS	\$160,000	\$80,000	\$80,000	\$35,000	\$30,000	\$30,000	\$35,000	37.5%	100%

This method of allocation also works easily in a multiple party situation. Adjusting the facts of the hypothetical to add a third party produces the following results:

Figure #15

EQUITABLE ALLOCATION ACCORDING TO EQUAL DIVISION OF COMPENSATION RESOURCES:
VARIATION ONE (PLAINTIFF UNINSURED)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$100,000	\$50,000	\$30,000	-0-	-0-	\$12,500	\$17,500	25%	—
<i>D</i> (50%)	\$60,000	\$30,000	\$50,000	\$25,000	\$25,000	\$12,500	\$25,000	41.66%	100%
TOTALS	\$160,000	\$80,000	\$80,000	\$25,000	\$25,000	\$25,000	\$42,500	31.25%	100%

Figure #16
EQUITABLE ALLOCATION ACCORDING TO EQUAL DIVISION OF COMPENSATION RESOURCES:
VARIATION ONE (MULTIPLE PARTY—EQUAL FAULT CASE)

Party and % of Fault	Injury	Verdict Against Party One	Verdict Against Party Two	Total Obligation To Other Parties	Insurance Coverage	Insurance Proceeds Paid into Court	Amount Received After Allocation	Obligation Remaining (Party)	% of Verdict Recovered	% of Insurance Proceeds Expended
<i>P</i> (33 1/3%)	\$100,000	(<i>D</i> ¹) \$33,333	(<i>D</i> ²) \$33,333	\$43,331	\$35,000 per injury	\$43,331	\$40,831*	-0-	61.2%	100%
<i>D</i> ¹ (33 1/3%)	\$60,000	(<i>P</i>) \$20,000	(<i>D</i> ²) \$20,000	\$56,664	\$25,000 per injury	\$48,331	\$40,000	(<i>P</i>) \$8,333	100%	100%
<i>D</i> ² (33 1/3%)	\$70,000	(<i>P</i>) \$23,331	(<i>D</i> ¹) \$23,331	\$53,333	\$15,000 per injury	\$30,000	\$40,831*	(<i>P</i>) \$18,333 (<i>D</i> ¹) \$5,000	87.5%	100%
TOTALS	\$230,000	\$76,662	\$76,662	\$153,328	\$150,000	\$121,662	\$121,662	\$31,666	79.3%	100%

* *P*'s and *D*²'s allocations are larger than *D*¹'s because *D*¹'s claims are fully satisfied from the equal division (1/3 share of \$121,662 = \$40,554). The excess from the first allocation is then returned to the resources "pool" and reallocated in equal share to *P* and *D*².

However, the allocation above illustrates the serious malapportionment that can result in this system which can come at the expense of the most seriously injured and the most financially responsible party. In addition, since the touchstone of the system is equal division, which in turn rests upon the presumption of equal fault of the parties, when fault is not equally apportioned, the allocation loses its foundation and parties who are much less at fault would underwrite others with greater fault.

e. An "equal-division" system: variation two.—The other variation of this system would permit a different form of equal participation in the compensation resources. In this system, apportionment would refer to what the parties collectively "bring" to the lawsuit by way of ability to pay for compensation and account for their equal fault by permitting each to "take away" an equalized *proportion* of those resources. It also addresses the relative magnitude of injury by permitting the *dollar amount* of compensation to vary according to that magnitude. Under this system, the claims of both parties after adjustment for "fault" would first be totalled. In the hypothetical case, this figure would amount to \$80,000. Next, the amount of resources applicable toward compensation would be totalled; here that figure would be the plaintiff's \$30,000 obligation and the defendant's \$25,000 worth of insurance coverage, or \$55,000. The proportion of the total claims which the total compensation resources represents would determine the proportion of each party's claim which they could recover from the lawsuit. Here, \$55,000 is 68.75% of \$80,000. The plaintiff would then be entitled to collect 68.75% of \$50,000, or \$34,375. The defendant would receive 68.75% of \$30,000, or \$20,625. Illustrated in chart form:

Figure #17
*EQUITABLE ALLOCATION ACCORDING TO EQUAL DIVISION:
VARIATION TWO*

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$100,000	\$50,000	\$30,000	\$35,000	\$30,000	\$34,375	-0-	68.75%	100%
<i>D</i> (50%)	\$60,000	\$30,000	\$50,000	\$25,000	\$25,000	\$20,625	-0-	68.75%	100%
TOTALS	\$160,000	\$80,000	\$80,000	\$60,000	\$55,000	\$55,000	-0-	68.75%	100%

The description of the system in these terms is actually a simplification of how the distribution would be accomplished. Since the plaintiff's compensation actually exceeds the amount of the defendant's liability insurance proceeds, the full description of the process of equitable distribution to accomplish that fact is fairly complicated.

The following is a more precise explanation of the distribution process. After determining the proportion of claims to be compensated, the court first makes an allocation designed to discharge the legal obligation each owes to the other. From the proceeds of insurance paid into court, it allocates \$30,000 to the defendant toward defendant's claim, thereby discharging the plaintiff's obligation. Then, the court allocates the remainder of the compensation resources to the plaintiff, which in this case would be \$25,000. Since the plaintiff's claim is not yet satisfied, the court then turns back to the defendant's resources to begin a second allocation. Since the defendant still owes a plaintiff \$25,000 and has the resources to meet that obligation by virtue of the first allocation, the court reallocates \$25,000 of that \$30,000 back to plaintiff, thereby legally satisfying plaintiff's claim. However, since the process has, at this stage, resulted in an actual misallocation of compensation, and is at odds with the equal proportions principle, the court must enter a third stage of equitable allocation to adjust the awards. Since the equitable proportion is 68.75%, the court then reallocates from the \$50,000 the plaintiff has received up to now the amount necessary to make up the difference between the defendant's allocation (\$5,000) and 68.75% of the defendant's claim (\$20,625), or \$15,625. That leaves the parties with their equitable proportion of the compensation resources and each claim against the other has been discharged.

The dollar amount distributed to each party by this system is more consistently proportionate than any of the systems discussed previously. For example, where the injuries are reversed:

Figure #18
EQUITABLE ALLOCATION ACCORDING TO EQUAL DIVISION:
VARIATION TWO (INJURIES REVERSED)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$60,000	\$30,000	\$50,000	\$35,000	\$35,000	\$22,500	-0-	75%	100%
<i>D</i> (50%)	\$100,000	\$50,000	\$30,000	\$25,000	\$25,000	\$37,500	-0-	75%	100%
TOTALS	\$160,000	\$80,000	\$80,000	\$60,000	\$60,000	\$60,000	-0-	75%	100%

The weakness of this system, of course, is that its "equal proportions" principle treats each of the parties the same, even though they have disproportionately contributed to the compensation resources. An incentive to be fully financially responsible exists, since to the extent that one's ability to pay is added to the compensation resource pool, the proportion of recoverable claims is increased. Yet in actual operation, the well-prepared person's resources are burdened by the ill-prepared person's recovery without direct relation to the amount supplied by the financially responsible person. If a stronger incentive to be financially responsible is desired in the system, some method of allocation would have to be developed⁴⁶⁰ which would reward the well-prepared party and penalize the ill-prepared. Furthermore, as is the case with the other alternatives, the system does not work in a situation where the fault of the parties is assessed in unequal percentages. Unless the fault of the parties is to be ignored—something hardly consistent with a comparative fault system—a system based on equal proportion produces misallocation.

f. An injury-fault-responsibility apportioned system.—A method of taking into account the relative magnitudes of injury, fault, and financial responsibility is possible. The system can work in multiple party cases as well as two-party ones. It is complicated, but no more than some of the other alternatives.

Starting from the assumption that the only meaningful "claim" an injured party has is one that can attach to recoverable resources, this system first determines the total pool of resources subject to compensation payments. That step will require reference to the amount of the verdicts and the amount of financial resources available for payment of those verdicts. In the two-party hypothetical discussed above, the verdicts produce insurance proceeds subject to payment totalling \$55,000.⁴⁶¹

In the second step, the proportion of injuries are calculated. Here, the plaintiff's injuries constitute 62.5% and the defendant's equal 37.5% of the total amount of injuries in the case.

The third step in the process would require the court to determine a "base recovery" figure for each of the parties. That "base recovery" represents the same proportion of the resource pool that the parties' injuries bear to the total injuries. The plaintiff's "base recovery" would be computed by applying the 62.5% injury percentage to the \$55,000 resource pool figure, producing a figure of \$34,375. The defendant's "base recovery" would be \$20,625 (\$55,000 x 37.5%).

⁴⁶⁰Recovery might be permitted in direct proportion to the amount of financial resources applicable to compensation which have been brought into the action. In the hypothetical presented in the text that would mean that the plaintiff would recover \$30,000 and the defendant \$25,000. Such an allocation would, of course, effectively transform liability insurance into loss insurance, a step the courts may not wish to take without legislative assistance.

⁴⁶¹The amount would be \$60,000 if the injuries were reversed.

The relative contributions of fault of the parties would next be taken into account. Each party's "base recovery" would be reduced in proportion to that party's percentage of fault. Since the two-party hypothetical has assumed equal fault, the "base recoveries" of each would be reduced by 50%.⁴⁶² The adjusted base recovery figures would then be \$17,187.50 and \$10,312.50 for the respective parties. The amounts from the reduction would then be "returned" to the resources pool for the final level of allocation. Here, \$27,500 remains in the pool.

In the final step, the proportionate contributions to the resource pool are computed, and the funds remaining in the pool are distributed in those proportions. Since the plaintiff contributed 54.5% of the insurance proceeds, he would receive \$14,987.50 in the final stage of allocation, while the defendant would receive \$12,512.50. Total allocations would then be \$32,175 for the plaintiff and \$22,825 for the defendant:

⁴⁶²See the discussion on following pages for an illustration involving unequal fault. Here, if the plaintiff's fault was assessed at 60%, for example, no occasion would arise for equitable allocation since the contributory negligence bar would be operable.

Figure #19

EQUITABLE ALLOCATION ACCORDING TO INJURY-FAULT-
RESPONSIBILITY APPORTIONMENT

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$100,000	\$50,000	\$30,000	\$35,000	\$30,000	\$32,175	-0-	64.35%	100%
<i>D</i> (50%)	\$60,000	\$30,000	\$50,000	\$25,000	\$25,000	\$22,825	\$17,825	76.08%	100%
TOTALS	\$160,000	\$80,000	\$80,000	\$60,000	\$55,000	\$55,000	\$17,825	68.75%	100%

(INJURIES REVERSED)

<i>P</i> (50%)	\$60,000	\$30,000	\$50,000	\$35,000	\$35,000	\$28,749	\$18,752	95.8%	100%
<i>D</i> (50%)	\$100,000	\$50,000	\$30,000	\$25,000	\$25,000	\$31,248	\$1,251	62.5%	100%
TOTALS	\$160,000	\$80,000	\$80,000	\$60,000	\$60,000	\$59,997	\$20,003	75%	100%

Clearly, neither the lesser-injured pays greater-injured principle nor the lesser-prepared pays greater-prepared principle dominates the allocation. Each is factored into the final recovery along with a consideration of fault (although here each party's fault balances the other), and produces allocations that reflect the particular combination of elements for each party. A comparison with the other alternatives in the context of the uninsured party demonstrates this effect very well:

Figure #20

EQUITABLE ALLOCATION ACCORDING TO INJURY-FAULT-RESPONSIBILITY APPORTIONMENT
(DEFENDENT UNINSURED)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$100,000	\$50,000	\$30,000	\$35,000	\$30,000	\$24,375	-0-	48.75%	100%
<i>D</i> (50%)	\$60,000	\$30,000	\$50,000	-0-	-0-	\$5,625	\$25,625	18.75%	-0-
TOTALS	\$160,000	\$80,000	\$80,000	\$35,000	\$30,000	\$30,000	\$25,625	37.5%	100%
(PLAINTIFF UNINSURED)									
<i>P</i> (50%)	\$100,000	\$50,000	\$30,000	-0-	-0-	\$7,812.50	\$12,812.50	15.63%	-0-
<i>D</i> (50%)	\$60,000	\$30,000	\$50,000	\$25,000	\$25,000	\$17,187.50	\$42,187.50	57.29%	100%
TOTALS	\$160,000	\$80,000	\$80,000	\$25,000	\$25,000	\$25,000	\$55,000	31.25%	100%

In each case, recovery is substantially less for the uninsured party, both in dollar amount and in relative percentages of verdict. However, some recognition for magnitude of injury is given and, even if the greater-injured party is uninsured, some recovery is permitted. In the case where both parties' financial resources are inadequate, the obligation is not treated as discharged in order to permit later recovery should circumstances change. It may amount to an empty remedy, but at least the possibility of full recovery remains open. If the obligation is discharged, the final adjustment of the parties' relative claims could produce a meager remedy. If further inducement toward financial responsibility is desired as a matter of policy, the obligations could be treated as discharged using the method of allocation described above.

The strongest feature of this system is its ability to produce allocations in multiparty unequal fault cases. Because one level of allocation is keyed to the proportions of fault, it is able to address the case where the parties' percentages of fault are different without distorting or abandoning a principle driving the system. The same method is used as in the two-party case. A demonstration of the method is shown in the chart below.

Figure #21

EQUITABLE ALLOCATION ACCORDING TO INJURY-FAULT-RESPONSIBILITY
MULTI-PARTY-UNEQUAL FAULT SITUATION

Party and % of Fault	Injury	Verdict Against Party One	Verdict Against Party Two	Total Obligation To Other Parties	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received After Allocation	Obligation Remaining (Party)	% of Verdict Recovered	% of Insurance Proceeds Expended
P (35%)	\$100,000	(D ¹) \$25,000	(D ²) \$40,000	\$45,500	\$35,000 per injury	\$45,500	\$48,779.62	-0-	75.05%	100%
D ¹ (25%)	\$60,000	(P) \$21,000	(D ²) \$24,000	\$42,500	\$25,000 per injury	\$42,500	\$37,503.68	-0-	83.34%	100%
D ² (40%)	\$70,000	(P) \$24,500	(D ¹) \$17,500	\$64,000	\$15,000 per injury	\$30,000	\$31,716.70	(P) \$25,000 (D ¹) \$9,000	75.52%	100%
TOTALS	\$230,000	\$70,500	\$81,500	\$152,000	\$150,000	\$118,000	\$118,000	\$34,000	77.63%	100%

g. *The system rejected by the Indiana General Assembly.*—The Indiana legislation as originally proposed included a mandatory set-off provision.⁴⁶³ Set-off was mandatory, that is, except with respect to “that portion of a claim . . . covered by liability insurance.”⁴⁶⁴ So, where the plaintiff had a claim of \$50,000 and insurance coverage of \$35,000, and the defendant had a claim of \$30,000 and insurance of \$25,000, each claim would be first paid to the extent of coverage. Here, the plaintiff’s claim would then be reduced to \$25,000, and the defendant’s would be paid in full. The defendant would then still owe the plaintiff \$25,000.

⁴⁶³Senate Bill No. 331, 102d Gen. Ass., 1st Reg. Sess., Sec. 1, § 6 (1983) (this section was subsequently deleted in the final version of the Act).

⁴⁶⁴*Id.*

Figure #22

THE SET-OFF RULE REJECTED BY THE INDIANA GENERAL ASSEMBLY

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$100,000	\$50,000	\$30,000	\$35,000	---	\$25,000	-0-	50%	100%
<i>D</i> (50%)	\$60,000	\$30,000	\$50,000	\$25,000	---	\$30,000	\$25,000	100%	100%
TOTALS	\$160,000	\$80,000	\$80,000	\$60,000	---	\$55,000	\$25,000	68.75%	100%

If the injuries were reversed, and each party's insurance coverage were first applied to the other's claim, the plaintiff would still have \$5,000 of his claim unsatisfied and the defendant would have \$15,000 of her claim remaining. Set-off would then be applied, with the result that the plaintiff would still owe the defendant \$10,000.

Figure #23

THE SET-OFF RULE REJECTED BY THE INDIANA GENERAL ASSEMBLY
(INJURIES REVERSED)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	\$60,000	\$30,000	\$50,000	\$35,000	---	\$25,000	\$10,000	83.33%	100%
D (50%)	\$100,000	\$50,000	\$30,000	\$25,000	---	\$35,000	-0-	70%	100%
TOTALS	\$160,000	\$80,000	\$80,000	\$60,000	---	\$60,000	\$10,000	75%	100%

The principle of lesser-prepared pays greater-prepared is thus subordinated to the principle of lesser-injured pays greater-injured. The system provides some incentive for financial responsibility, since the only way one can be assured of receiving any benefit of set-off is to make sure liability is covered.

Where one party is insured but the other is not, the uninsured party benefits by receiving the proceeds of the more-prepared party's insurance coverage, and may benefit even further if set-off is applied to the claims remaining outstanding after deduction of insurance proceeds. Thus, where the plaintiff is uninsured and incurs an \$80,000 claim against the defendant, for example, and the defendant has a \$40,000 claim against the plaintiff with \$30,000 worth of liability insurance, the plaintiff is entitled to the entire \$30,000 proceeds and then may offset the remainder of his claim against the defendant's. The defendant receives nothing, and still owes the plaintiff \$10,000:

Figure #24

THE SET-OFF RULE REJECTED BY THE INDIANA GENERAL ASSEMBLY
(PLAINTIFF WITH LARGER CLAIM AND UNINSURED)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
<i>P</i> (50%)	\$160,000	\$80,000	\$40,000	-0-	---	\$30,000	-0-	37.5%	-0-
<i>D</i> (50%)	\$80,000	\$40,000	\$80,000	\$30,000	---	-0-	\$10,000	-0-	100%
TOTALS	\$240,000	\$120,000	\$120,000	\$30,000	---	\$30,000	\$10,000	25%	100%

Furthermore, this system suffers from the same tendency to distort apportionment as the systems discussed above where one principle is permitted to control the allocation. The distortion is perhaps not as great, but clearly apportionment based upon fault is rendered all but inoperative beyond the determination of the verdicts. Unlike many of the other alternatives, however, it can work in a multiple party, unequal-fault setting:

Figure #25

THE SET-OFF RULE REJECTED BY THE INDIANA GENERAL ASSEMBLY
(MULTIPARTY-UNEQUAL FAULT SITUATION)

Party and % of Fault	Injury	Verdict Against Party One	Verdict Against Party Two	Total Obligation To Other Parties	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received After Allocation	Obligation Remaining (Party)	% of Verdict Recovered	% of Insurance Proceeds Expended
P (35%)	\$100,000	(D ¹) \$25,000	(D ²) \$40,000	\$45,500	\$35,000 per injury	---	\$40,000	-0-	61.5%	100%
D ¹ (25%)	\$60,000	(P) \$21,000	(D ²) \$24,000	\$42,500	\$25,000 per injury	---	\$36,000	-0-	80%	100%
D ² (40%)	\$70,000	(P) \$24,500	(D ¹) \$17,500	\$64,000	\$15,000 per injury	---	\$42,000	(P) \$25,000 (D ¹) \$9,000	100%	100%
TOTALS	\$230,000	\$70,500	\$81,500	\$152,000	\$150,000	---	\$118,000	\$34,000	77.63%	100%

However, the same weakness in regard to misallocations resulting in uninsured and underinsured cases is graphically illustrated in the above hypothetical. The grossly underinsured party (D^2) is permitted to recover fully as a result of the other parties' adequate coverage. The others receive only the meager proceeds of D^2 's insurance policy and a continuing obligation from D^2 . The latter may be an empty remedy if D^2 has no other way of satisfying the judgment.

A benefit of the system, however, is that it is quite easy to apply in comparison to some of the others discussed here. That ease of administration may make the system attractive despite its shortcomings.

As demonstrated, several approaches to set-off are possible, each with its advantages and disadvantages. In refusing to address the issue, the General Assembly may have intended to give the courts the flexibility to develop an acceptable approach along the lines of any of these models or other alternatives. Whether it had such intentions or not, the courts certainly have the power to adjust the parties' claims using methods which have the flexibility to address the several issues raised in this discussion. With that power resides the responsibility to consider the issues carefully and to avoid adoption of a rigid, one-way rule which cannot address all of the interests of the parties and the public at the same time.

B. Last Clear Chance

The doctrine of last clear chance is a common law rule that permits a negligent plaintiff to recover from a negligent defendant.⁴⁶⁵ A plaintiff uses the doctrine to counteract the defendant's assertion that if the plaintiff had exercised due care, the injury would not have occurred. In effect, the doctrine permits the plaintiff to admit to contributory negligence without having recovery barred because the defendant's duty of care includes protecting the plaintiff in his position of peril. The similarity in function between the doctrine and comparative fault raises a question of its continued availability in the new system, a question the Indiana Act fails to address.

Consider these hypothetical facts as a background for the following discussion: The plaintiff, without looking or listening for trains, drove his new car upon defendant's railroad tracks at the top of an incline. Because the plaintiff was unfamiliar with the operation of the clutch and manual transmission, his car sputtered and stopped on the tracks. The plaintiff was not aware that the defendant's diesel engine was on the tracks. The engineer was travelling faster than required because he wanted to go home. No railroad cars were attached to the engine. At

⁴⁶⁵See generally 2 F. HARPER & F. JAMES, *THE LAW OF TORTS*, §§ 22.12-.14, at 1241-63 (1956); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 66, at 427-33 (4th ed. 1971).

the time the engineer saw the plaintiff drive onto the tracks and stop and for some moments thereafter, he could have stopped the engine without hitting the plaintiff's car. Thinking the plaintiff was trying to frighten a passenger, the engineer slowed the engine but did not sound the required warning signal. When he realized that the plaintiff was not going to drive the car off the tracks, the engineer belatedly attempted to brake the train and a spectacular collision occurred. The plaintiff was severely injured.⁴⁶⁶ If the plaintiff sues the defendant under present Indiana law, the defendant will raise contributory negligence, and the plaintiff will respond with the theory of last clear chance.

To successfully invoke last clear chance, the plaintiff must prove that the defendant's employee did *in fact* have the last clear chance to avoid the injury. To do that the plaintiff must show that:

- (1) The defendant had actual knowledge of the plaintiff;
- (2) The defendant knew of the plaintiff's perilous position;
- (3) The defendant had physical control over the instrumentality and had the last opportunity through the exercise of reasonable care to avoid the injury; and
- (4) The plaintiff was oblivious to his own danger, notwithstanding his own contributory negligence.⁴⁶⁷

A plaintiff establishing those facts will defeat the defendant's contributory negligence defense, and will be entitled to recover fully for his injuries.⁴⁶⁸

Given this significant exception to the contributory negligence bar, it is important to know whether the doctrine will operate as an exception to the apportionment principle in comparative fault. Some comparative fault statutes have specifically addressed the matter.⁴⁶⁹ The Uniform Comparative Fault Act, for example, states that "[t]his rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance."⁴⁷⁰ The Uniform Act proposes "pure" comparative fault, and attempts to completely displace contributory negligence and its kindred doctrines. The Indiana Act, by virtue of its "greater than 50%" modification, may not have abandoned all vestiges of con-

⁴⁶⁶The hypothetical is a modification of the facts in the Indiana case of *Terre Haute, Indianapolis & Eastern Traction Co. v. Stevenson*, 189 Ind. 100, 123 N.E. 785 (1919).

⁴⁶⁷*McKeown v. Calusa*, 172 Ind. App. 1, 6, 359 N.E.2d 550, 554 (1977) (quoting *National City Lines, Inc. v. Hurst*, 145 Ind. App. 278, 282, 250 N.E.2d 507, 510 (1969)).

⁴⁶⁸*Terre Haute, Indianapolis & Eastern Traction Co. v. Stevenson*, 189 Ind. 100, 123 N.E. 785 (1919); *McKeown v. Calusa*, 172 Ind. App. 1, 359 N.E.2d 550 (1977). See generally 2 F. HARPER & F. JAMES, *supra* note 465, §§ 22.12-.14, at 1241-63; W. PROSSER, *supra* note 465, § 66, at 427-33.

⁴⁶⁹See CONN. GEN. STAT. ANN. § 52-572h(c) (West Supp. 1984); OR. REV. STAT. § 18.475 (1977).

⁴⁷⁰UNIFORM ACT, *supra* note 455, § 1(a), at 36.

tributory negligence. The Indiana Act does not include the sentence quoted from the Uniform Comparative Fault Act. Its exclusion raises the issue of whether a plaintiff may still employ the doctrine of last clear chance to completely defeat the defendant's contributory fault defense.

Much of the uncertainty surrounding the future of last clear chance can be traced to the doctrine's past. The doctrine wandered upon the torts scene in 1842 in the famous "jackass" case of *Davies v. Mann*,⁴⁷¹ and has never been adequately defined.⁴⁷² The court in *Davies* spoke in general terms only of defendant's failure to exercise "proper care" to avoid the injury and of his duty to travel at a "pace as would be likely to prevent mischief" without considering whether plaintiff's donkey was lawfully on the highway.⁴⁷³ Subsequent courts have offered greater precision of language, without adding precision of thought.⁴⁷⁴ The precision that has been lacking concerns the foundation of the doctrine. Some courts and commentators consider last clear chance an offshoot of

⁴⁷¹152 Eng. Rep. 588 (1842). Plaintiff allowed his donkey to wander in the public highway, though he did "fetter" its front legs. Defendant, driving his wagon down a hill at a fast clip, struck and killed the donkey. The court held defendant liable. Professor MacIntyre points out that cases containing the formula, though not the language, of last clear chance predated the *Davies* case. MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225, 1228-30 (1940).

⁴⁷²See James, *Last Clear Chance—A Transitional Doctrine*, 47 YALE L.J. 704 (1938); MacIntyre, *supra* note 471, at 1230; 2 F. HARPER & F. JAMES, *supra* note 465, § 22.14, at 1255-60; W. PROSSER, *supra* 465, § 66, at 427-29.

⁴⁷³152 Eng. Rep. at 589.

⁴⁷⁴Professor James cites two good examples in his article, *supra* note 472, at 709 n.31. In *Rasmussen v. Fresno Traction Co.*, 15 Cal. App. 2d 356, 59 P.2d 617 (1936), the court stated:

As has frequently been said, the doctrine of the last clear chance means exactly what the words imply and the essence of the rule is that it is applicable only where the defendant, notwithstanding the plaintiff's negligence, has a clear chance, after realizing that the plaintiff cannot escape, to avoid the accident by the exercise of ordinary care, and where the plaintiff cannot avoid it by the use of such care.

15 Cal. App. 2d at 362, 59 P.2d at 619. The court was content that sufficient explication of the doctrine had been given and then proceeded to reverse a judgment for the plaintiff. The holding was based on evidence which showed (1) the defendant's agent did not see the plaintiff because he was distracted in giving change to his passengers and (2) the plaintiff did not check the tracks again after having seen the defendant's streetcar some 200 feet away. The court said that such evidence would not support the inference that the defendant's agent "had a clear opportunity to avoid the accident" nor that the plaintiff "was unable to escape from his position of peril." *Id.* at 369, 59 P.2d at 623.

In *Keller v. Norfolk & W. Ry. Co.*, 109 W. Va. 522, 156 S.E. 50 (1930), the court *Keller v. Norfolk & W. Ry. Co.*, 109 W. Va. 522, 156 S.E. 50 (1930), the court said:

The doctrine of last clear chance is a simple and meritorious one, and bears its definition in its title. Its simple test is whether the defendant had the opportunity to prevent the accident after the plaintiff ceased to have it

Its application needs no perversion of logic or distortion of facts.

Id. at 528, 156 S.E. at 52. The court denied recovery to the plaintiff based on evidence

proximate cause.⁴⁷⁵ Others consider it an early form of comparative or apportioned fault.⁴⁷⁶ The future of the doctrine and the approach courts may use in interpreting it in light of comparative fault are directly linked to their view of the doctrine's theoretical source.

1. *Proximate Cause*.—Often the doctrine has been linked to proximate cause, and that view is favored by Indiana courts.⁴⁷⁷ Adherents of the proximate cause theory look for the "last wrongdoer." Pursuant to this view, if a defendant could avoid injurious contact with a plaintiff whose own faulty acts exposing him to harm had "come to rest," the defendant may not use the plaintiff's negligence as a defense. The defendant's failure to avoid the negligent plaintiff is taken to be the legally responsible cause of the injury,⁴⁷⁸ although sometimes such an analysis will not bear scrutiny. The weakness of linking last clear chance to proximate cause is demonstrated by changing the facts of the automobile-train hypothetical. In the revised hypothetical, the driver did not own the car but had borrowed it from a friend. If the owner sued the driver to recover for damage to the car, the driver could not escape liability by claiming that his acts were not the proximate cause of the accident.⁴⁷⁹ It would be inconsistent for the driver to be considered a proximate cause of the injury in a suit with the car owner and not to be a proximate cause in a suit with the railroad.

For this reason, the proximate cause foundation of last clear chance has been termed a rationalization.⁴⁸⁰ Even if the proximate cause link is a rationalization, a state's highest court could scarcely admit to having rationalized all along and then order that all earlier decisions be treated only as casuistic artifacts of an effort to protect plaintiffs. Such an admission would be especially difficult in a jurisdiction where the legislature, not the court, had adopted comparative fault. In such a jurisdiction, the legislature will have deprived the courts of an opportunity

that the defendant's fireman saw the plaintiff's car approaching the railroad crossing and blew the whistle when he saw that the automobile was not going to stop. The engineer did not see the automobile "until it was right at the crossing." *Id.* at 524, 156 S.E. at 51. The court seemed to base its holding upon its belief that the defendant's agent was "ignorant of the plaintiff's danger." *Id.* at 528, 156 S.E. at 52. The court refused to impute knowledge in the absence of actual knowledge, and found defendant not liable.

⁴⁷⁵See *infra* text and citations accompanying notes 477-84. See also James, *supra* note 472, at 709-15; W. PROSSER, *supra* note 465, § 66, at 427.

⁴⁷⁶See, James, *supra* note 472, at 715-23; MacIntyre, *supra* note 471, at 1226-35; W. PROSSER, *supra* note 465, § 66, at 428. See also *infra* text and citations accompanying notes 485-92.

⁴⁷⁷McKeown v. Calusa, 172 Ind. App. 1, 359 N.E.2d 550, 559 (1977) (citing Bates v. Boughton, 151 Ind. App. 139, 278 N.E.2d 316 (1972)). See also Terre Haute, Indianapolis & Eastern Traction Co. v. Stevenson, 189 Ind. 100, 123 N.E. 785 (1919).

⁴⁷⁸See James, *supra* note 472, at 709-15; W. PROSSER, *supra* note 465, § 66, at 427.

⁴⁷⁹See Lincoln City Lines v. Schmidt, 245 F.2d 600 (8th Cir. 1957); Atlantic Coast Line R. Co. v. Coxwell, 93 Ga. App. 159, 91 S.E.2d 135 (1955).

⁴⁸⁰James, *supra* note 472, at 710-11. See MacIntyre, *supra* note 471, at 1226.

to address such doctrines as last clear chance on an incremental basis through transitional cases.⁴⁸¹

The proximate cause theory, when used by a court, may be more than rationalization. It may be something entirely different from a concealed attempt to mitigate the harshness of the contributory negligence doctrine. It might be a distillation of all of the court's thoughts about policy, justice, fairness, experience, pragmatics, and cultural and religious values to answer the question: Should this defendant be liable to this plaintiff for this injury?

"Proximate cause" may be a special linguistic shorthand, an almost talismanic representation for the larger and more complex thoughts that courts sometimes avoid expressing. The phrase in the context of last clear chance possibly stands for judicial thinking that:

- (1) The defendant's duty to avoid harm to others exposed to the risks he creates includes a duty to those who have been exposed to the risk through their own fault; and
- (2) The defendant's duty extends to such plaintiffs because considerations such as policy, justice, fairness, experience, pragmatics, and cultural and religious values⁴⁸² demand that injury to even inattentive and inadvertent persons be avoided by the exercise of ordinary care; and
- (3) The defendant's duty may not be excused by the plaintiff's conduct because the considerations in part (2) prompt the belief that such a defense would in effect declare otherwise "antisocial" conduct acceptable merely because it impinged upon other negligent conduct; and
- (4) The defendant's duty differs from and is larger than the plaintiff's duty because it includes the risk that someone else will be inattentive and inadvertent and because accidents can be better prevented if the costs of failure are borne by the actor who had the best chance to avoid the accident; and
- (5) The defendant's breach of duty makes him legally accountable to a plaintiff who may in turn be legally accountable to others.⁴⁸³

⁴⁸¹Where comparative fault has been judicially adopted, courts are more willing to abolish last clear chance than where the legislature has adopted it. On the other hand, comparative fault has been adopted in many jurisdictions only recently, and it may be too early to draw any firm conclusions from the relatively small samples. See HEFT & HEFT, *COMPARATIVE NEGLIGENCE* App. 2, at 188-89 (Supp. 1983).

⁴⁸²Of course, each of *these* terms are themselves shorthand, almost talismanic representations of larger and more complex thoughts. A court may prefer to use the representative terms rather than set out the thoughts behind them.

⁴⁸³Thus, a court dealing with the railroad crossing hypothetical might well announce its decision only in terms that defendant's failure to take the last clear chance to avoid

When courts do not engage in this larger and more complex explication of "proximate cause," one cannot know whether they really meant to say all of that. The previous paragraph could be a totally different basis for a court's decision that a particular defendant ought to compensate a particular plaintiff for a particular injury. A court using proximate cause as a special shorthand in last clear chance cases may have difficulty jettisoning the doctrine as mere rationalization. A court which specifically disavowed any attempt to apportion fault in applying last clear chance would have even more trouble rejecting the doctrine.⁴⁸⁴ To such a court, a comparative fault statute would not of itself compel the abandonment of the doctrine of last clear chance because the shorthand meaning of "proximate cause" shows that the doctrine's roots go deep into the very core of society.

2. *Apportioned Fault*.—A competing theory links the doctrine of last clear chance to apportioned fault and suggests that last clear chance is a way of balancing or weighing the conduct of the parties. In this theory, the doctrine will bar the defendant's contributory negligence defense if the defendant's "later"⁴⁸⁵ failure to act is more faulty than the plaintiff's contributory fault.⁴⁸⁶ This theory is also susceptible to charges of rationalization, because the doctrine operates in an "all-or-nothing" fashion even in jurisdictions that disavow degrees of negligence.⁴⁸⁷ In many cases, the results are inconsistent with the actual culpability of the parties.⁴⁸⁸ Furthermore, if the doctrine were a rationalization for camouflaged comparative fault, once comparative fault had been adopted, last clear chance could be abandoned, and jurisdictions retaining the "all-or-nothing" aspect of the doctrine after adopting comparative fault would appear rather foolish.⁴⁸⁹

harm was the proximate cause of injury. If the above construction of thought stood behind the words "proximate cause," it might well represent a "countervailing morality" which maintains that defendants should not have "an 'open season' upon plaintiffs who are caught in a negligent position." L. GREEN, JUDGE AND JURY 119, 234 (1930).

⁴⁸⁴E.g., *Terre Haute, Indianapolis & Eastern Traction Co. v. Stevenson*, 189 Ind. 100, 108, 123 N.E. 785, 787 (1919).

⁴⁸⁵It is not always actually later. In some instances, according to Professor James, plaintiff actually has the later opportunity to escape the peril, but defendant is held responsible because her "earlier opportunity is so much greater." James, *supra* note 472, at 717.

⁴⁸⁶See MacIntyre, *supra* note 471, at 1232-52; W. PROSSER, *supra* note 465, § 66, at 428.

⁴⁸⁷Indiana is one of those jurisdictions. Cf. *Birdsong v. ITT Continental Baking Co.*, 160 Ind. App. 411, 413, 312 N.E.2d 104, 106 (1974) (where the court rejected the seat belt defense partially on the basis that Indiana does not recognize degrees of negligence) (citing *Pawlisch v. Atkins*, 96 Ind. App. 132, 182 N.E. 636 (1932)).

⁴⁸⁸See W. PROSSER, *supra* note 465, § 66, at 428 and authorities cited therein.

⁴⁸⁹There is, of course, the possibility of judicial refusal or inability to recognize and depart from an anomalous rule of law. However, Professor James does not suggest that

Commentators have agreed that courts use last clear chance to escape the harsh consequences of contributory negligence⁴⁹⁰ and to allow injuries to "apportion" fault according to "popular notions and prejudices."⁴⁹¹ Apportionment is a descriptive term, however, which may explain *why* some courts employ the doctrine to reach a particular result but does not explain *how* a court concluded that the defendant rather than the plaintiff should bear the cost of the accident. A need might well exist for a doctrine that tempers the harshness of contributory fault, but that need alone cannot justify the doctrine,⁴⁹² especially where the harshness is merely redirected toward the defendant. If avoidance of harsh results is the goal, the doctrine should operate evenhandedly. A court which allowed a plaintiff to benefit from the doctrine because the contributory negligence bar is too harsh would be hardpressed to explain why the doctrine itself was not harsh, especially if the plaintiff's actions were more faulty than the defendant's.

If this need to ameliorate contributory negligence is valid, then the last clear chance doctrine may no longer be needed after the apportionment principles of comparative fault are adopted. If apportioned fault is the basis of the doctrine, the adoption of a general, more refined concept of fault comparison could easily displace it. Several jurisdictions have abolished last clear chance on this basis.⁴⁹³

The Indiana legislature has not adopted pure apportionment or comparative fault because a plaintiff who is greater than 50% at fault is barred from recovery by contributory negligence.⁴⁹⁴ Because of this vestige of traditional contributory negligence, Indiana courts may wish

a disguised comparative fault principle explains the genesis and development of last clear chance in all judicial minds. See James, *supra* note 472, at 709-15. If other principles apply, it would be fallacious to characterize the retention of the doctrine in comparative fault jurisdictions necessarily as a needless and foolish practice. See V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 7.2, at 136-37 (1974); H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT § 8.2, at 172-73 (1978).

⁴⁹⁰See W. PROSSER, *supra* note 465, § 66, at 428, § 68, at 439 and authorities cited at 439 n.7; at 439 n.7; V. SCHWARTZ, *supra* note 489, § 7.1, at 131-32, § 7.2, at 139 and authorities cited therein.

⁴⁹¹2 F. HARPER & F. JAMES, *supra* 465, § 22.14, at 1261.

⁴⁹²See MacIntyre, *supra* note 471, at 1236-51; see also, James, *supra* note 472, at 716-19.

⁴⁹³As of the time of this writing eight jurisdictions appear to have abandoned the doctrine based upon the adoption of comparative fault. Four of those jurisdictions have adopted the "pure" form of comparative fault. *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); *Li. v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981). Four "modified" comparative fault jurisdictions have also abolished the doctrine. *Cushman v. Perkins*, 245 A.2d 846 (Me. 1968); *Davies v. Butler*, 95 Nev. 763, 602 P.2d 605 (1979); *Ratlief v. Yokum*, 280 S.E.2d 584 (W. Va. 1981); *Danculovich v. Brown*, 593 P.2d 187 (Wyo. 1979).

⁴⁹⁴IND. CODE § 34-4-33-4(a), (b).

to retain the doctrine of last clear chance simply as a matter of balance.⁴⁹⁵ That is, since plaintiffs are totally barred under some circumstances, defendants ought to bear total liability under some circumstances.

No matter what the source of the doctrine, last clear chance is difficult to apply and confuses juries.⁴⁹⁶ It has come under sharp and well-considered criticism by courts⁴⁹⁷ and commentators⁴⁹⁸ and is showing signs of drowning in the tide of comparative fault.⁴⁹⁹ Last clear chance has figured into a significant amount of litigation in Indiana.⁵⁰⁰ Continued recognition of the doctrine, with its obscure theoretical bases and potential to confuse, might undermine a comparative fault system by distorting the apportionment of fault. The doctrine traditionally requires jurors to bifurcate the defendant's conduct into two "levels" of fault. The first "level," the negligence producing the risk of injury, could be excused by plaintiff's own contributory fault. The second "level," the failure to exercise ordinary care to prevent that risk from causing actual harm, cannot be excused merely by reference to plaintiff's fault. Using apportionment or comparative fault principles, a jury would not split the defendant's conduct into levels of fault, but would simply be required to decide how much the defendant's total course of conduct was at "fault" in injuring the plaintiff. Both "parts" of defendant's conduct would be considered as a whole and then compared to plaintiff's "fault" for purposes of apportionment.

If the negative features of the last clear chance doctrine are considered unjustifiable costs of its continued vitality, and the policy and functional bases of the doctrine can be served by the comparative fault system, the courts of Indiana would do well to abandon it. Whatever the outcome, the failure of the Comparative Fault Act to address the issue puts the onus upon the Indiana courts to consider the doctrine carefully when the issue arises.⁵⁰¹

⁴⁹⁵See V. SCHWARTZ, *supra* note 489, § 7.2, at 136-37, 139-40.

⁴⁹⁶2 F. HARPER & F. JAMES, *supra* note 465, § 22.14, at 1261.

⁴⁹⁷*E.g.*, authorities cited *supra* note 493.

⁴⁹⁸See authorities cited *supra* note 472.

⁴⁹⁹See authorities cited *supra* note 493. In addition, Judge Woods suggests that several other comparative fault jurisdictions have abandoned the doctrine without a judicial pronouncement by removal from jury instructions and official commentary. H. WOODS, *supra* note 489, Appendix and Cumulative Supplement to Appendix (1982) (state by state treatment).

⁵⁰⁰Research at the time of this writing shows that the doctrine was at issue in 32 reported appellate level cases in Indiana in the last 18 years.

⁵⁰¹Legislatures generally have found it unnecessary to address the issue (or, perhaps more accurately, have found it necessary to *not* address it). Only Connecticut and Oregon have abolished the doctrine by comparative fault legislation. CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1983-84); OR. REV. STAT. § 18.475(1) (1977).

VI. CONCLUSION

Adoption of a "modified" system of comparative fault is an extremely important first step in reforming the torts compensation system in Indiana, but travel along the comparative fault path has yet to begin. Many adjustments in manner and means of travel will doubtless occur as experience with features of the terrain traversed increases. To draw firm conclusions about the Comparative Fault Act at this early stage of the journey is, in this light, risky business. There are several forks in the path and many conclusions about the operation and effect of the Act are dependent upon which branches of the forks are selected. In some instances the Act has decided in advance which branch to take and in others provides some guidelines for making the decision, but in others the finders of fact and law are on their own. This discussion has attempted to identify some of each of those instances.

The way is not, however, through completely alien territory. The general terrain has been traversed many times before on different pathways. It has been the thesis of this Article that the Comparative Fault Act should not be viewed as a complete displacement of principles of accountability that have been developed in the common law of tort. The domain of tort liability remains essentially the same as prior to the adoption of comparative fault. Significantly, the apportionment principle permits us to traverse that domain in a manner much different than before. The parties concerned are now permitted to share in the benefits and detriments of that method of travel on a much more equitable basis than under traditional systems. Yet the lessons of the past, the principles, policies, and pragmatics already developed in the common law, should be helpful elements in the most important decisions to be made regarding the direction the courts should take along the comparative fault path. Some of those principles, policies, and pragmatics have been highlighted here in an attempt to generate thinking in preparation for those decisions.

This is not to say that the journey will be an easy one. Application of the Act in even the limited sense of mechanics is a fairly complex proposition. When viewed as an overlay upon the preexisting foundation of tort liability, as this Article has attempted to do, many difficult issues arise which have not, and in some instances should not have been, answered in the Act. In some cases, because of the Act's expansive definition of "fault," perhaps the foundations of liability will have to be readjusted to accommodate the overlay of the apportionment principle superstructure. Attorneys and judges should not, however, lose sight of the principles, policies, and pragmatics that form those foundations. To assist juries performing the apportionment function, lessons of the past should unhesitatingly be brought to bear upon the issues that arise. There is room for healthy disagreement about which branches of the path should be taken, but judges and juries should not in the face of that

disagreement resign themselves out of frustration to arbitrary, mechanical "easy ways out." The new system, in comparison to the old, is complex and difficult to apply. For awhile, it will seem cumbersome to those of us accustomed to the quick simple answers provided by the contributory negligence system. Yet the old system was more than just a series of results. It was and remains a system of thought from which we have learned lessons about the way the law ought to fashion remedies for harms.

Likewise, where those lessons teach that a clear break from concepts outmoded by comparative fault is wise, attorneys and judges should unhesitatingly step in the new direction and assist the jury through the new territory. Officers of the court should resist temptations to simply turn hard questions over to jurors in hopes that they will "work something out." The apportionment of fault, as this discussion has attempted to demonstrate, is not simply an unprincipled factual determination of "compromise" verdicts. Nor is it a matter of simple, mechanical "yes or no" decisionmaking. Our formal system of dispute resolution places an awesome responsibility upon jurors and requires them to discharge that responsibility through a series of exceedingly difficult decisions. On the basis of sometimes sketchy and circumstantial evidence, we require them to decide the existence or nonexistence of a fact upon which the financial and emotional interests of people depend. As attorneys working daily within the system, we sometimes lose sight of the difficulty of such decisions and the pressures they bring to bear upon fact finders. A question of whether the defendant failed to place guards and warnings around her street excavation may seem a fairly simple matter of observation of physical attributes, but destruction of the scene from the effects of the ensuing crash of the plaintiff's vehicle complicate the otherwise easy decision. Deciding whether the defendant was at fault in leaving the excavation unprotected may not be a matter of particular difficulty in the majority of cases. The significance of that decision, and its underlying factual determination, for the fortunes of the disputants demands that the officers of the court and the jury not take it lightly. Whether the plaintiff's vehicle was out of control when it hit the defendant's excavation may be another simple decision of fact. If it was, that complicates the question of whether the defendant's fault was a cause of the plaintiff's injuries. Whether the plaintiff was at fault in allowing the vehicle to get out of control adds another complication. Even in the traditional contributory negligence system, jurors need careful assistance in working their way through cases like this.⁵⁰² Under comparative fault, a complicated and difficult overlay has been placed upon all cases, whether factually simple or complicated. Now jurors must not

⁵⁰²The hypothetical facts are a "modernization" of the facts in *Stacy v. Knickerbocker Ice Co.*, 84 Wis. 614, 54 N.W. 1091 (1893).

only decide whether the defendant's and plaintiff's acts and omissions constitute "fault," they must somehow act as if that "fault" is quantifiable and assign precise percentages of that "fault" to the parties. Conscientious jurors will require a great deal of assistance in such decisions. Conscientious attorneys and judges will not send those jurors off to the deliberation room with the mere admonition to do their best and a hope that they will.

The comparative fault system does not cast the officers of the court into the journey without tools of assistance. Extremely important principles of law, old and new, exist to guide the ultimate assignment of responsibility. This Article has attempted, on a somewhat selective basis, to raise some of the issues that will arise during the journey, to highlight some of the principles pertinent to those issues, and to suggest some methods for resolving those issues in the context of comparative fault.

Drafting and Legislative History of the Comparative Fault Act

EDGAR W. BAYLIFF*

I. PASSAGE OF THE ACT

A. *Historical Background*

Efforts to secure passage of a comparative negligence bill commenced in Indiana in 1973. Separate bills were offered in that year by Representatives Nelson Becker of Logansport and Craig Campbell of Anderson.¹ Showing remarkable persistence, these veteran legislators were also co-sponsors of the comparative fault bill which was finally enacted into law in 1983.² Through the years other bills were offered.³ None received much attention until 1981 when Representative Jerome Reppa of Munster introduced a bill⁴ based on the 1977 Uniform Comparative Fault Act of the National Conference of Commissioners on Uniform State Laws.⁵ As such, it was a "pure" comparative fault bill.⁶ Reppa's bill progressed only as far as a committee hearing.⁷

Lobbyists representing liability insurance company interests stoutly opposed the 1981 bill. They were especially concerned with the prospect of plaintiffs and defendants both being able to recover in the same action.⁸

*Partner with law firm of Bayliff, Harrigan, Cord & Maugans—Kokomo, Indiana. A.B., Indiana University, 1951; J.D., 1954. Mr. Bayliff was the primary drafter of the Indiana Comparative Fault Act.

¹H.B. 1680 and 1771, 98th Gen. Assembly, 1st Sess. (1973). Neither bill emerged from the House Judiciary Committee, 1973 HOUSE JOURNAL 1893, 1907.

²Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 4, 1983 Ind. Acts 1930, 1931 (codified at IND. CODE § 34-4-33-4 (Supp. 1984)).

³See, e.g., H.B. 195B, 100th Gen. Assembly, 1st Sess. (1977); H.B. 1141, 101st Gen. Assembly, 1st Sess. (1979).

⁴H.B. 2054, 102nd Gen. Assembly, 1st Sess. (1981).

⁵UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 35 (Supp. 1984).

⁶A "pure" comparative fault law is one which allows recovery by a claimant if there was any fault on the part of the defendant, subject to the claimant's damages being reduced in proportion to his own fault.

⁷IND. HOUSE & SENATE JOURNAL INDEX 220 (1981).

⁸Under "pure" comparative fault laws, a plaintiff who is 90% at fault, for example, may recover 10% of his total damages from a defendant who is 10% at fault, and the defendant, if injured, may recover 90% of his damages from the plaintiff who is 90% at fault. On the other hand, under a "modified" comparative fault law, the right of recovery of a claimant who is partly at fault is cut off after the claimant's fault reaches some designated threshold. Typically, the threshold may be reached when the claimant's fault is greater than slight, greater than 49%, or greater than 50%. Where the threshold of the modified plan is greater than 50%, the potential for both plaintiff and defendant to recover against each other in the same action still exists, but only in one instance, namely, when each is 50% at fault. In cases involving multiple defendants, where the modified plan does not require

The insurance lobbyists also claimed to find the bill so complex as to be incomprehensible. They assured the legislative committee members that even a Philadelphia lawyer could not understand it. They pointed especially to the provisions of section 3 of the Uniform Act and the accompanying commissioners' comments as supporting their argument. Those provisions relate to when a set-off will be allowed under various combinations of circumstances involving liability insurance coverage.

Learning from experience, the comparative fault proponents proposed a simpler "modified" bill in the 1983 session of the General Assembly. Senate Bill 331,⁹ introduced by Senators John M. Guy of Monticello and James R. Monk of Sullivan, provided that when the claimant's fault was greater than fifty percent he was barred from any recovery; otherwise the claimant's fault only diminished the amount of his recovery.

B. Key Provisions of the 1983 Bill

Senate Bill 331, as introduced, and its successor, Senate Bill 287,¹⁰ as eventually passed, were framed in terms of comparative "fault" rather than comparative "negligence." A comparative "fault" bill encompasses more than negligence actions and contributory negligence defenses. It covers strict liability, warranty, and willful and wanton misconduct actions as well as defenses based upon assumption of risk, incurred risk, misuse, unreasonable failure to avoid an injury, and failure to mitigate damages. In so providing, the bill borrowed the provisions of section 1 of the Uniform Act with slight modifications. But in other respects, the bill departed substantially from the Uniform Act.

The most significant departure was the adoption of the more conservative greater-than-fifty-percent threshold rather than a pure comparative fault standard. Other notable differences were the bill's failure to provide for rights of contribution; the failure to preclude set-off of claims and counterclaims covered by liability insurance; and a partial modification of the rule of joint and several liability for concurrent wrongs.¹¹

In the proponents' view, these departures from the Uniform Act caused the bill to fall short of the ideal. Nevertheless, the compromise was strongly advocated in the belief that Indiana otherwise might well become the fiftieth, rather than the fortieth, state to adopt comparative fault principles.

the plaintiff's fault to be compared individually with each defendant but rather with all defendants (or with all defendants and all nonparties), there are other instances in which both plaintiffs and defendants may recover against each other.

⁹S.B. 331, 103rd Gen. Assembly, 1st Sess. (1983).

¹⁰S.B. 287, 103rd Gen. Assembly, 1st Sess. (1983).

¹¹*Cf.* UNIF. COMPARATIVE FAULT ACT, §§ 1-8, 12 U.L.A. 35-46 (Supp. 1984).

C. *Procedural History*

The bill passed the Senate by a vote of 34-15¹² and went to the House where it was assigned to the Public Policy and Veterans Affairs Committee. After a hearing, the committee sent the bill to the full House without amendments.¹³ On the House floor, the bill was amended to rearrange the order of matters to be considered by the jury. As amended, the bill required the jury first to consider the percentages of fault of the parties and then to consider the damages sustained, but only if the claimant's fault was not greater than fifty percent.¹⁴ Another amendment was added to make clear that the bill would not apply to intentional wrongs.¹⁵

Once these changes were made, opponents of the bill then attacked what they termed the "empty chair" problem. Their concern was that claimants would fail to bring into the lawsuit all of the parties whose fault had contributed to the claimants' injuries. The opponents feared that the defendants would have to pay not only for damages caused by their individual wrongs but also for damages caused by the wrongs of nonparties. Nevertheless, the bill cleared the second reading amendment stage without further amendments.¹⁶

At this point, word was received that Attorney General Linley E. Pearson had informed House Speaker J. Roberts Dailey that passage of the bill would cost the state of Indiana millions of dollars each year. As a result, the Speaker was unwilling to hand down the bill for a final vote unless the objections of the Attorney General could be satisfied. The Attorney General was willing to meet with proponents of the bill to discuss his objections, but only if a group of designated persons was assembled for the meeting. Included were interested legislators and representatives of the Indiana Supreme Court, the Indiana Court of Appeals, and the insurance industry. The meeting was arranged and at the end of an all-day effort, the objections of the Attorney General had been satisfied—but only at substantial cost. That cost was an agreement to amend the bill to permit consideration of the fault of nonparties, and to exclude governmental entities from its coverage.

By the time the meeting with the Attorney General had been held, the deadline for House action on Senate bills had passed. This meant that the only way the bill could be enacted was by stripping the contents of another bill, which had passed both houses, and substituting the amended language of the comparative fault bill. The substituted language would still require the approval of a House-Senate conference committee

¹²IND. HOUSE & SENATE JOUR. INDEX 135 (1983).

¹³IND. HOUSE JOUR. 629 (1983).

¹⁴*Id.* at 658.

¹⁵*Id.*

¹⁶*Id.*

and ultimately the full House and Senate. Senator James Butcher of Kokomo made available Senate Bill 287,¹⁷ which dealt with distribution of trust assets. That bill was stripped, and the comparative fault language was duly substituted. Senate Bill 287 was successively approved by the conference committee,¹⁸ by the Senate by a vote of 41-6,¹⁹ by the House by a vote of 78-12,²⁰ and by Governor Robert Orr.²¹ Its effective date was set for January 1, 1985,²² and its application was limited to civil actions accruing on or after January 1, 1985.²³

II. FEATURES OF THE ACT

A. *Threshold of Fault Required to Preclude Recovery*

With the exception of "pure" comparative fault plans,²⁴ such as that contained in the Uniform Act, Indiana's plan is among those most favorable to claimants in the aspect of when recovery is allowable. Thus, to constitute a complete bar, under the Indiana plan, the claimant's fault must be greater than fifty percent not only in two-party cases, where there is only one claimant and one defendant,²⁵ but also in multiple party cases. In multiple party cases, the claimant may recover even though his fault is equal to, but not greater than, the aggregate fault of all tortfeasors who contributed to the harm.²⁶ The tortfeasors with whom the claimant's fault must be compared include not only the defendants but also non-party tortfeasors, such as those with whom the claimant has reached a settlement, tortfeasors over whom the claimant could not get jurisdiction, and any other tortfeasors who are liable to the claimant and who can be identified by name.²⁷ Section 6's requirement that a nonparty tortfeasor be identified by name presumably precludes the assertion of a nonparty defense based upon the conduct of an unnamed "phantom."²⁸

¹⁷S.B. 287, 103rd Gen. Assembly, 1st Sess. (1983).

¹⁸IND. HOUSE JOUR. 777 (1983).

¹⁹IND. SENATE JOUR. 641, 642 (1983).

²⁰IND. HOUSE JOUR. 783 (1983).

²¹*Id.* at 876.

²²Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 3, 1983 Ind. Acts 1930, 1933.

²³Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 2, 1983 Ind. Acts 1930, 1933.

²⁴Eleven states have "pure" comparative fault plans. Some have been adopted by statutes, but most "pure" plans have been adopted by judicial decisions. Fourteen states, excluding Indiana, have "greater than 50%" plans. Eleven states have "49%" type plans (where recovery is precluded if claimant's fault is equal to or greater than that of the defendant). Two states have plans under which the claimant may recover if his negligence is slight. One state, Tennessee, has a still more restricted plan. See C.R. HEFT & C.J. HEFT, COMPARATIVE NEGLIGENCE MANUAL 118-19 (Supp. 1982) [hereinafter cited as HEFT & HEFT]; Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982).

²⁵IND. CODE 34-4-33-4(a) (Supp. 1984).

²⁶*Id.* § 34-4-33-4(b).

²⁷*Id.* §§ 34-4-33-4 to -6.

²⁸California, Kansas, and Ohio permit consideration of the contribution of phantoms. HEFT & HEFT, *supra* note 24, at 118-19.

In contrast to the liberality of the Indiana Act in multiple party cases, Wisconsin will not permit a recovery unless the claimant's fault is not greater than that of each individual defendant against whom recovery is sought.²⁹ The trend in most states, however, appears to be toward comparing the claimant's fault with the aggregate fault of all the defendants.³⁰ Indiana may be the only state which expressly goes one step further and makes the comparison with the aggregate fault of all tortfeasors, whether sued or not.³¹

B. *Partial Abrogation of Joint and Several Liability Principles*

As implied above, a claimant who is fifty percent at fault may recover against each of three defendants who were twenty percent, twenty percent, and ten percent at fault, respectively, or against a defendant who is ten percent at fault where there were nonparty tortfeasors who were forty percent at fault. Of course, under traditional rules governing the liability of concurrent tortfeasors, the defendant who is ten percent at fault would be liable for the full amount of the claimant's recovery.³² However, limiting recovery against each defendant to the percentage of his own fault, as provided by sections 5(a)(4) and 5(b)(4) of the 1983 Act, implicitly abrogates the traditional rule of joint and several liability for concurrent wrongs, but only in certain instances. The trade off for permitting the claimant who is fifty percent at fault to recover from the defendant who is ten percent at fault was, in part, this partial abrogation of the joint and several liability rule.

Nevada, Vermont, New Hampshire, and Kansas seem to have abrogated the joint and several liability rule completely.³³ Oklahoma has done likewise where the plaintiff is partly at fault.³⁴ Oregon and Texas have also abrogated the joint and several liability rule in only those instances where the fault allocated to a defendant is less than that allocated to the claimant.³⁵

Nothing in the Indiana Act, however, indicates a legislative intention that there be an abrogation of the joint and several liability rule among defendants who collectively are to be treated as a single party, as allowed

²⁹*Soczka v. Rechner*, 73 Wis. 2d 157, 242 N.W.2d 910, 914 (1976). New Jersey and Wyoming follow the same rule. *Van Horn v. William Blanchard Co.*, 173 N.J. Super. 280, 281, 414 A.2d 265, 266, (1980), *aff'd*, 88 N.J. 91, 93, 438 A.2d 552, 554 (1981); *Board of County Comm'rs. v. Ridenour*, 623 P.2d 1174, 11183, *reh'g denied* 627 P.2d 162 (Wyo. 1981).

³⁰*HEFT & HEFT*, *supra* note 24, § 8.130. *See also* *Mountain Mobile Mix, Inc. v. Gifford*, 660 P.2d 883, 888 (Colo. 1983).

³¹IND. CODE 34-4-33-4(b) (Supp. 1984).

³²*Hoesel v. Cain*, 222 Ind. 330, 344-46, 53 N.E.2d 165, 171, *reh'g denied* 222 Ind. 349, 53 N.E.2d 769 (1944).

³³H. WOODS, *COMPARATIVE FAULT* § 13:4, at 226 (1978).

³⁴*Id.* at 77 (Supp. 1983).

³⁵*Id.* § 13:4, at 226.

by section 2(b) of the Act. In other words, the plaintiff with a judgment against an agent and a principal should be able to collect the full amount of his judgment from either. Likewise, nothing in the Act indicates a legislative intention that the joint and several liability rule be abrogated in cases in which claims under the Comparative Fault Act are joined with the claims not covered by the Act. Among other claims excluded under the Act are those based on intentional wrongs;³⁶ claims under the Indiana Tort Claims Act;³⁷ and claims based on strict liability and breach of warranty.³⁸

Requiring one tortfeasor to bear all of the burden of a wrong committed jointly with others has been perceived as out of step with the philosophy of comparative fault laws that claimants should no longer be completely barred from recovery by their own contribution to the wrong. Indiana's response to that perception, in the form of a partial abrogation of the joint and several liability rules, is in contrast to the approach of most other states. Most states retained the joint and several liability rule, and established a right of contribution among concurrent tortfeasors.³⁹ The inevitable accompaniment of rights of contribution is the enlargement of the scope of the litigation by permitting the claimants to bring in additional parties or by permitting the filing of later suits.⁴⁰

Section 7 of the Indiana Act ensures against any possibility of rights of contribution being engrafted onto the Act by the courts. It provides: "In an action under this chapter, there is no right of contribution among tortfeasors."⁴¹ The Indiana plan simplifies lawsuits. This simplification is beneficial to claimants and especially beneficial to their counsel. Additional parties brought in by defendants may greatly increase the lawyer effort required to handle the claim, as well as the time required to get to trial. Such additional effort and time may be of keen significance to claimants' counsel working on a contingent fee basis. The purchase of this greater simplicity came at a high price. That price, in multiple tortfeasor cases, was the shifting of the risk of insolvency of one or more tortfeasors from the solvent tortfeasors to the claimants. Of course, the risk of insolvency of a single defendant has always rested with claimants.

C. *Nonparty Practice or the "Empty Chair" Problem*

Under Indiana law, as well as in other states, there is a problem when one of multiple tortfeasors is not brought into the action. Under present

³⁶IND. CODE § 34-4-33-2 (Supp. 1984).

³⁷*Id.* § 34-4-33-8.

³⁸*Id.* § 34-4-33-2.

³⁹H. WOODS, *supra* note 33, at 13:5-10.

⁴⁰*Id.*

⁴¹IND. CODE § 34-4-33-7 (Supp. 1984). Section 7 goes on to provide: "However, this section does not affect any rights of indemnity." *Id.* In other words, a principal may still seek indemnity from his agent who is at fault.

law, the theoretical possibility exists that a defendant who is ten percent at fault may be required to pay one hundred percent of the damages caused by himself and an insolvent joint tortfeasor who is ninety percent at fault. The experience of most practitioners, however, has been that jurors can rarely stomach this outcome. The result is that most such cases end up with verdicts in favor of the defendant who is ten percent at fault. The Indiana program comes to grips with this problem directly by providing, in effect, that a claimant's recovery shall be diminished by the percentage of fault of named nonparties.

Despite the cries of anguish by plaintiffs' lawyers, the nonparty features of the Act will not be totally injurious to claimants. The same jurors who find it hard to bring themselves to find for plaintiffs against defendants who are ten percent at fault may, under the Indiana plan, find it much easier to rule for plaintiffs when they are required to award only ten percent of the plaintiffs' damages against defendants who are ten percent at fault.

The Indiana plan will serve the interests of both sides by furnishing a straightforward method of dealing with situations in which claimants have settled with one or more tortfeasors. Jurors will simply diminish the claimant's recovery by the percentage of fault (not by the amount paid) of the tortfeasors who have settled.

D. Temporary Inclusion of Strict Liability and Breach of Warranty Cases

Section 2(a) of the 1983 Act expressly provided that comparative fault principles should apply to strict liability and breach of warranty cases. That provision was borrowed from section 1(b) of the Uniform Act. However, the 1984 amendments to the Act deleted strict liability and breach of warranty cases from its coverage.⁴² The effects of this change will be discussed in some detail later in this Article.⁴³

Interestingly, in states which have adopted comparative "negligence" statutes, courts have ruled that strict liability cases are encompassed by comparative fault principles,⁴⁴ even though the statutes do not specifically mention such cases.

E. Exclusion of State Tort Claims

Section 8 of the Act specifically exempts claims against governmental entities or public employees under Indiana Code sections 34-4-16.5-1 to

⁴²Act of Mar. 5, 1984, Publ. L. No. 174-1984, Sec. 8, § 13, 1984 Ind. Acts 1468, 1473 (codified at IND. CODE § 34-4-33-13 (Supp. 1984)).

⁴³See *infra* notes 54-67 and accompany text.

⁴⁴See, e.g., *Kennedy v. City of Sawyer*, 228 Kan. 439, 450, 618 P.2d 788, 798 (1980); *Busch v. Busch Construction, Inc.*, 262 N.W.2d 377, 393 (Minn. 1977); *Baccelleri v. Hyster Co.*, 287 Or. 3, 12, 597 P.2d 351, 355 (1979); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 352 (Tex. 1977); and cases collected at Annot., 9 A.L.R. 4TH 633 (1981).

-19. Nothing in the Act, however, prohibits joinder of governmental entities with nongovernmental entities. Thus, the right to join such defendants should continue to exist.

Ironically, the governmental exemption could pose a decided disadvantage to governmental entities. Faultless claimants may recover the entire awards from governmental entities even though the fault of other defendants substantially contributed to their injuries. The partial abrogation of joint and several liabilities applies only to claims brought under the Act, and because the Act does not apply to governmental entities, it will give governmental entities no protection on this score. On the other hand, if there is any contributory fault on the part of claimants, they will be completely barred from recovering from any governmental entities. In addition, these claimants will have the governmental entities' negligence set off against them as to the remaining defendants.

This unbalanced situation came about because the Indiana Attorney General had the political power to ensure defeat of any bill which did not exempt governmental entities. In a future session of the General Assembly, the symmetry of the law should be restored by the repeal of section 8.

F. Forms of Verdicts

In cases based upon fault, juries no longer will be able to simply find for plaintiffs or defendants and, in the case of verdicts for the plaintiffs, fill in figures. Future juries will be required, under section 5, to determine the percentage of fault of all tortfeasors, including plaintiffs, defendants, and nonparties; and, where the fault of plaintiffs does not exceed fifty percent, they will be required to determine the total damages of the plaintiffs as if fault were to be disregarded. Finally, juries will be required to multiply the percentages of fault of each defendant by the total damages to render individual verdicts against each defendant or, where appropriate, against each group of defendants who should be treated as a single party. The content of the instructions which the trial court must give to juries is set out under section 5(a) where single defendants are involved and under section 5(b) where multiple defendants are involved. The precise forms of verdicts which trial courts should furnish juries is left to the court's discretion. If confusion is to be avoided, it probably will be necessary for trial courts to design and furnish juries with separate verdict forms for each claim, counterclaim, or cross-claim.

A suggested form of verdict to be used where the fault of one plaintiff and one defendant (or one defendant and additional related defendants) are involved is set out below:

VERDICT

- 1. We find that the comparative fault of plaintiff, *P*, was _____ %
- 2. We find that the comparative fault of defendant, *D*₁, and defendant, *D*₂, was _____ %
- 3. Disregarding the comparative fault of the parties, we find that plaintiff's total damages are \$ _____
- 4. A. We find for the plaintiff, *P*, against the defendants, *D*₁ and *D*₂, in the sum of \$ _____

FOREMAN

- B. We find for the defendants, *D*₁ and *D*₂.

FOREMAN

A suggested form of verdict to be used where the fault of one plaintiff, two defendants, and a nonparty are involved is set out below:

VERDICT

- 1. We find that the comparative fault of plaintiff, *P*, was _____ %
- 2. We find that the comparative fault of defendant, *D*₁, was _____ %
- 3. We find that the comparative fault of defendant, *D*₂, was _____ %
- 4. We find that the comparative fault of nonparty, *NP*, was _____ %
- 5. Disregarding the comparative fault of the parties and the nonparty, we find that plaintiff's total damages are \$ _____
- 6.A. We find for the plaintiff, *P*, against the defendant, *D*₁, in the sum of \$ _____
- B. We find for the plaintiff, *P*, against the defendant, *D*₂, in the sum of \$ _____

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- 7.A. We find for the defendant, *D*₁.

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- B. We find for the defendant, *D*₂.

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In using these verdict forms when there are multiple plaintiffs, the fault of any other plaintiff (when that fault is not imputable to the plaintiff for whose claim the verdict form is being supplied) should be treated as the fault of a nonparty. In addition, where there are claims against additional defendants who are not subject to adjudication under the Act, such as claims for strict liability, breach of warranty, or claims against governmental units, those defendants should be treated as nonparties for purposes of the comparative fault verdict. Other verdict forms should be furnished with respect to all such noncomparative fault claims.

One of the purposes of requiring that jurors not only determine the percentages of fault and total damages but also the ultimate general verdict or verdicts was to ensure that jurors would know the effects of their determinations. In Wisconsin, jurors determine total damages and percentages of fault but are precluded from returning a general verdict *and* from knowing the effects of their findings.⁴⁵ The Wisconsin practice is reported to result in many mistrials because of inadvertent, or attempted covert, disclosures to jurors about the effects of their determinations. The practice reflects a lack of confidence in the good judgment of jurors.

In contrast to the Wisconsin statute, a Colorado statute reads:

In a jury trial in any civil action in which contributory negligence is an issue for determination by the jury, the trial court shall instruct the jury on the effect of its finding as to the degree of negligence of each party. The attorneys for each party shall be allowed to argue the effect of the instruction on the facts which are before the jury.⁴⁶

This language was added to the Colorado law following a decision which precluded counsel from informing the jury of the effects of their findings.⁴⁷

Several other states whose comparative fault laws preclude jurors from returning general verdicts have mandated, either by statute or court decision, that jurors be informed of the effects of their special verdicts.⁴⁸

⁴⁵HEFT & HEFT, *supra* note 24, § 3.570, at 81.

⁴⁶COLO. REV. STAT. ANN. § 13-21-111(4) (1983).

⁴⁷Simpson v. Anderson, 186 Colo. 163, 526 P.2d 298 (1974).

⁴⁸The Connecticut comparative negligence statute has language somewhat similar to the Colorado statute. The statute reads in pertinent part: "(b) In any action to which this section is applicable, the instructions to the jury given by the court shall include an explanation of the effect on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party." CONN. GEN. STAT. ANN. § 52-572h (1982). The Oregon statute requires that the jury be informed of the legal effect of its answers to questions as to percentages of fault. OR. REV. STAT. § 18.480(2) (1983). In North Dakota the jury is entitled to know the effect of their determination of percentages of fault and the parties may comment to the jury concerning the same. N.D. CENT. CODE § 9-10-07 (1983). Idaho has reached the same result by court decision. Seppi v. Betty, 99 Idaho 186, 195, 579 P.2d 683, 692 (1978). The Idaho decision contains a good rationale as to why the jury should be informed of the effects of their special verdicts. New Jersey holds that the jury is entitled to know the legal effect of its allocation of negligence because the jury will thereby

Maine,⁴⁹ New Hampshire,⁵⁰ and Oklahoma⁵¹ achieve the result of jurors knowing the entire effects of their finding by the device of requiring general verdicts.

III. 1984 AMENDMENTS TO THE ACT

A. *Passage of Senate Bill 419*

Senator Guy with the cosponsorship of Senator Monk and Representatives Becker and Campbell introduced Senate Bill 419 in the 1984 session. The bill was debated, modified, and polished. Thereafter it was passed in the Senate by a vote of 42-1⁵² and in the House by a vote of 80-15.⁵³

B. *Removal of Claims for Strict Liability and Breach of Warranty from the Act*

The most far-reaching change made by the Senate Bill 419 was the removal of claims for strict liability and breach of warranty from the coverage of the Act.⁵⁴

By this change, the comparative *fault* plan of the Act was converted into something closer to a comparative *negligence* plan. The impetus for the change came from the Indiana Manufacturers Association. One of its lobbyists declared that his organization did not want to lose the absolute defenses of assumption of risk, misuse of the product, and the "open and obvious danger" rule. The breach of warranty exclusion tagged along with no expressed analysis as to why.

The manufacturers' objective will undoubtedly be realized as long as the action is brought under the theory of strict tort liability. However, if a products liability action is not brought under the theory of strict liability but, instead, under the theory of negligence, the objective will fail. The manufacturers' representatives understood these facts but, notwithstanding, pressed successfully for the change.

C. *Tactical Considerations Arising from Exclusion of Strict Liability and Breach of Warranty Actions from the Act*

The exclusion of strict liability and breach of warranty claims from the comparative fault plan presents claimants' counsel with options to

be better able to fulfill its fact finding function. *Roman v. Mitchell*, 82 N.J. 336, 345, 413 A.2d 322, 327 (1980).

⁴⁹ME. REV. STATS. ANN. tit. 14, § 156 (1983-84).

⁵⁰N.H. REV. STATS. ANN. § 507:7-a (1983).

⁵¹*Smith v. Gizzi*, 564 P.2d 1009, 1013, (Okla. 1977).

⁵²IND. SENATE JOUR. 559 (1984).

⁵³IND. HOUSE JOUR. 599 (1984).

⁵⁴As previously noted, strict liability and breach of warranty were included in the 1983 version of the Comparative Fault Act. See *supra* notes 43-44 and accompanying text.

file products liability claims in negligence, strict liability, or both. The choice may profoundly affect the outcome of the case.

Of course, not every product liability case lends itself to being pursued under a negligence theory as in strict liability. Nevertheless, there are some products liability cases in which proof of one theory is proof of the other, or in which proof of one theory is as easily made as that of the other. Under *Ortho Pharmaceutical Corp. v. Chapman*,⁵⁵ the elements of a strict liability case based upon inadequate warnings are indistinguishable from the elements of a negligence case.⁵⁶ The same conclusion appears to remain valid under the 1983 amendments to the Products Liability Act.⁵⁷

Section 2.5 of that statute recites that a product is defective if the seller fails to "properly" label the product so as to give "reasonable warnings" of danger. This language is standard negligence language. Similarly, the same section speaks about products which are defective by reason of inadequate instructions for use in terms having the ring of negligence.⁵⁸

The "state of the art" language of the strict liability statute also suggests that a *design* strict liability case may be little different than a negligence case.⁵⁹

On the other hand, when the problem with the product is in the way it was made, it is much easier to prove that the product is defective and unreasonably dangerous than it is to prove that it was the negligence of the defendant which caused the product to be defective. Notwithstanding such difficulty, the greater burden of proving negligence should be considered when there is need either of the ameliorating effects of comparative fault or of avoiding some limitation or restriction upon strict liability.

There are several instances in which the negligence theory may have an advantage over the strict liability theory. The first of these instances is when the claimant misuses the product. Product misuse is a complete defense to strict liability.⁶⁰ But in a negligence case when the defense is appropriately translated into a form of assumption of risk, it becomes only a partial defense.⁶¹ The second situation in which a negligence theory

⁵⁵180 Ind. App. 33, 388 N.E.2d 541 (1979).

⁵⁶*Id.* at 45, 388 N.E.2d at 549.

⁵⁷Act of Apr. 21, 1983, Pub. L. No. 297-1983, 1983 Ind. Acts 1814 (codified at IND. CODE § 33-1-1.5-1 to -5 (Supp. 1984)).

⁵⁸IND. CODE § 33-1-1.5-2.5(b) (Supp. 1984). This section provides: "A product is defective under this chapter if the seller fails to: (1) . . . (2) give *reasonably* complete instructions on proper use of the product; when the seller, by *exercising reasonable diligence*, could have made such warnings or instructions available to the user or consumer." *Id.* (emphasis added).

⁵⁹*Id.* § 33-1-1.5-4(b)(4). This section provides: "When physical harm is caused by a defective product, it is a defense that the design, manufacture, inspection, packaging, warning, or labeling of the product was in conformity with the generally recognized state of the art at the time the product was designed, manufactured, packaged, and labeled." *Id.*

⁶⁰*Id.* § 3-1-1.5-4(b)(2).

⁶¹*Id.* § 34-4-33-2.

may have an advantage over strict liability is when the claimant assumes the risk of the product's defectiveness.⁶² Here, again, a complete defense is reduced to a partial defense. The final instance is when the defectiveness of the product is open and obvious.⁶³ If, as asserted by Paul Rheingold, in *Expanding Liability of the Product Supplier: A Primer*,⁶⁴ the open and obvious danger rule is merely assumption of risk as a matter of law, then a complete bar, in yet another instance, has been reduced to a partial bar.⁶⁵

By contrast there are other instances in which asserting a strict liability theory may be to the advantage of the claimant. Among such instances are the following:

(1) When the claimant is partly at fault, but that fault is contributory negligence as opposed to assumption of risk, product misuse, or using a product with an open and obvious danger. While contributory negligence constitutes a partial defense under section 2, it is no defense to a strict liability action.⁶⁶

(2) When there are other defendants who are partly at fault and there is doubt as to their solvency, so that the partial abrogation of the joint and several liability rule would be a problem.

(3) When there are parties who were partly at fault whom the claimant cannot sue, or does not want to sue, so that the nonparty provisions of the Act would be a problem.

(4) When the claimant has an opportunity to secure a substantial payment under a loan agreement, whose beneficial effects are largely destroyed when the Act applies.⁶⁷

It might be urged that the need to weigh the advantages of strict liability versus negligence could be avoided by asserting both theories. However, before this easy avenue is chosen, counsel should consider carefully the extent to which the jury may be confused by having to cope with both theories and the diverse effects flowing from them.

D. Elimination of "Primary Defendant" Concept

Section 2(a) of the 1983 Act contained a provision reading: "'Primary defendant' means a defendant against whom recovery is sought based upon

⁶²*Id.*

⁶³*Bemis Co. v. Rubush*, 427 N.E.2d 1058, 1061 (Ind. 1981).

⁶⁴2 HOFSTRA L. REV. 521 (1974).

⁶⁵*Id.* at 541.

⁶⁶IND. CODE § 33-1-1.5-4 (Supp. 1984).

⁶⁷Loan agreements have achieved much popularity in Indiana since the case of *NIPSCO v. Otis*, 145 Ind. App. 159, 250 N.E.2d 378 (1969). The loan agreement derives its great advantage to claimants from the joint and several liability rule. Thus, if Defendant *A* lends the claimant \$100,000.00 subject to repayment only if the claimant recovers \$200,000.00 from the Defendant *B*, the claimant may proceed against Defendant *B* for the full amount of his damages and do so as if the payment under the loan agreement had not been made. When the Act applies, however, much of the former advantage of the loan agreement is destroyed by virtue of the claimant's recovery from Defendant *B* being diminished by Defendant *A*'s percentage of fault.

his own alleged act, omission, or product and not based upon his relationship to another defendant.”⁶⁸ This provision was stricken from the Act by the 1984 amendments.⁶⁹ In so doing, sections 1 and 2 of the Act were brought more in line with sections 1 and 2 of the Uniform Comparative Fault Act, upon which Indiana’s sections 1 and 2 were patterned.⁷⁰ The Uniform Act, and now the Indiana Act, leaves it to the courts to determine when defendants should be treated as a single party. The commissioners’ comments to section 2 of the Uniform Act describe appropriate instances for treating defendants as a single party: “In situations such as that of principal and agent, and driver and owner of a car, or manufacturer and retailer of a product, the court may under appropriate circumstances find that the two persons should be treated as a single party for purposes of allocating fault.”⁷¹

E. Inconsistent Verdicts

Senate Bill 419 added section 9 to the 1983 Act to cope with mistakes by juries which cause inconsistencies in the determinations of percentages of fault, total damages, and ultimate general verdicts. Before discharging the jury the trial court is required to inspect the verdict or verdicts to determine whether or not all components are consistent. If they are not, the trial court is then required to “(1) inform jurors of the inconsistencies; (2) order them to resume deliberations to correct the inconsistencies; and (3) instruct them that they are at liberty to change any portion or portions of the verdicts to correct the inconsistencies.”⁷²

F. Combined Claims Against Qualified Health Care Providers and Nonhealth Care Providers

The medical malpractice statute⁷³ creates a problem as to claims asserted against a defendant covered by the Medical Malpractice Act and a defendant not so covered. Typically, the claims would be joined in one action. One of the purposes of the joinder would be to prevent the claimant from being whipsawed by two defendants, i.e., by a defendant physician blaming the other defendant, for example a drug company, and by the defendant drug company in turn blaming the physician. This kind of

⁶⁸IND. CODE § 34-4-33-2(a) (Supp. 1983) (repealed 1984).

⁶⁹Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2(a), 1984 Ind. Acts 1468, 1468 (codified at IND. CODE § 34-4-33-2(a) (Supp. 1984)).

⁷⁰Compare UNIF. COMPARATIVE FAULT ACT §§ 1, 2, 12 U.L.A. 37-40 (Supp. 1984) with IND. CODE §§ 34-4-33-1, -2 (Supp. 1984).

⁷¹UNIF. COMPARATIVE FAULT ACT § 2 commissioners’ comments, 12 U.L.A. 39 (Supp. 1984).

⁷²Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec 4, § 9, 1984 Ind. Acts 1468, 1471 (codified at IND. CODE § 34-4-33-9 (Supp. 1984)).

⁷³IND. CODE §§ 16-9.5-1-1 to -10-5 (1982).

finger pointing by defendants is likely to do the claimant no harm when it occurs in the same action. It may cause serious harm, however, when the defendants are sued in separate actions. The abrogation of the joint and several liability rule plus the nonparty provisions of the Act may increase that possibility of harm. Nevertheless, the time required to complete the medical review panel process (before suit can be filed against a physician) militates against joinder. If the claimant waits to sue a nonparty, such as a drug company, until the medical review panel has rendered its opinion, the statute of limitations on the claim against the drug company may have run.

Section 11 of the Act, added by Senate Bill 419,⁷⁴ deals with this situation by simply providing that the claimant may sue the nonhealth care provider; then, upon request by the claimant, the court shall grant reasonable delays in that action until the medical review panel procedure has been completed. Thereafter, the court is required to permit joinder of the qualified health care provider as an additional defendant. Thus, a claimant who is worried that the drug company will succeed in laying the blame on the physician in the first action, and that the physician will succeed in tying the blame on the drug company in the later separate action has in section 11 an antidote for his worry.

G. Liens and Claims for Payment of Medical Expenses

Senate Bill 419 added section 12 to the Act to deal with subrogation liens or other claims stemming from the payment of medical expenses or other benefits in a claim for personal injuries or death. It provides that when the claimant's recovery is diminished by comparative fault, lack of the defendant's solvency, or by any other cause, the subrogation lien or other claim shall be diminished in the same proportion as the claimant's recovery is diminished.⁷⁵ Liens under Indiana Code sections 22-3-2-13 or 22-3-7-36 for the payment of worker's compensation or occupational disease benefits are excluded from this provision.⁷⁶

H. Nonparty Practice

As earlier mentioned, the "empty chair" or "nonparty" language of the Act was added at the eleventh hour before passage in 1983. Upon reflection, proponents of the Act felt that the extent to which the concept had been defined and the provisions respecting the effects which should

⁷⁴Act. of Mar. 5, 1984, Pub. L. No. 174-1984, Sec 6, § 11, 1984 Ind. Acts 1468, 1472 (codified at IND. CODE § 34-4-33-11 (Supp. 1984)).

⁷⁵Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 7, § 12, 1984 Ind. Acts 1468, 1472-73 (codified at IND. CODE § 34-4-33-12 (Supp. 1984)).

⁷⁶*Id.*

follow were inadequate. An effort to remedy this deficiency was made in Senate Bill 419 by adding a definition of the meaning of "nonparty," and a new section devoted to the "nonparty defense." The 1984 amendment defines nonparty as "a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant. A nonparty shall not include the employer of the claimant."⁷⁷

The last sentence of the "nonparty" definition was not included in the original proposal. Instead, an entirely different section had been proposed and provided essentially that when the claimant's recovery was diminished by comparative fault, the employer's lien for payment of worker's compensation benefits under Indiana Code section 22-3-2-13 should be similarly diminished. The insurance lobbyists were opposed to any such "tinkering" with the Indiana Workmen's Compensation Act.⁷⁸ As a trade-off, they offered as an addition to the original nonparty definition a sentence reading: "A nonparty shall not include the employer of the claimant." Even though the trade off was not a like-for-like nature, it was accepted by the proponents of the bill.

The new section pertaining to the nonparty defense provides that the burden of proof of the defense shall be on the defendant.⁷⁹ Lobbyists for the Indiana Manufacturers Association were concerned that this recitation might somehow reduce the claimant's burden of proof. To allay this concern, the following sentence was added: "However, nothing in this chapter relieves the claimant of the burden of proving that fault on the part of the defendant or defendants caused, in whole or in part, the damages of the claimant."⁸⁰

Section 10(c) deals with a concern that defendants might delay asserting their nonparty defenses until after the statute of limitation had run upon the claimant's right to sue the nonparty. This subsection requires a defendant who has knowledge of a nonparty defense to assert it as part of his first answer. If the defendant does not have knowledge of the defense at the outset, guidelines are set out directed toward the twin objectives of giving the defendant a reasonable opportunity to discover that he has a nonparty defense and of requiring the defendant to disclose that defense in sufficient time to allow the additional party to be brought into the litigation before the claim becomes time barred.⁸¹

Section 10(d) attacks the same problem as section 10(c), but in the context of cases filed under the medical malpractice statute. When a

⁷⁷Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2, 1984 Ind. Acts 1468, 1468-69 (codified at IND. CODE § 34-4-33-2(a) (Supp. 1984)).

⁷⁸IND. CODE tit. 22, art. 3 (1982 & Supp. 1984).

⁷⁹Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 5, § 10(b), 1984 Ind. Acts 1468, 1471 (codified at IND. CODE § 34-4-33-10(b) (Supp. 1984)).

⁸⁰*Id.*

⁸¹*See* IND. CODE § 34-4-33-10(c) (Supp. 1984).

medical malpractice claim is filed with the Indiana Insurance Commissioner, the defendant is required to plead his nonparty defense within ninety days. The defendant may apply to any court having jurisdiction over the claim for additional time to assert that defense. The court may grant additional time but must give due consideration to the claimant's need for time to commence an action against any nonparty who may be identified by the defendant before the running of the statute of limitations.⁸²

IV. CONCLUSION

The Act provides solutions to many issues which otherwise would have taken years of litigation to resolve. The solutions, whether ideal or not, at least represent a consensus of diverse groups who spent more than a year, over two legislative sessions, striving to achieve a plan under which they could live and which the General Assembly would pass.

By ruling out rights of contribution, a large problem area, with which other states have wrestled, was sidestepped. In so doing, Indiana simplified its plan.

By requiring jurors to record their determinations of percentages of fault, total damages, and the mathematics by which they compute general verdicts, we have made our plan more complex than the plans of most other states. Nevertheless, jurors can meet the challenge of complex verdicts if lawyers and judges will first meet the challenge of designing understandable jury verdict forms which lead jurors step-by-step along the path they must follow.

Not all issues with which the courts of other states have struggled are solved by the Act. Some of the issues not dealt with are: set-off where the parties have liability insurance; the continued role, if any, of the rule of last clear chance; the continued role, if any, of the sudden peril doctrine; the continued role, if any, of the open and obvious danger rule; how the fault of subsequent, but not joint or concurring, tortfeasors shall be handled; whether comparative fault principles shall apply to the recovery of punitive damages; and many others. These issues are left to the courts to decide. Since it is the genius of the common law to deal with problems on a case by case basis, the failure of the legislature to provide all of the answers eventually needed is not necessarily a mistake.

It is undoubtedly true that the adoption of comparative fault principles will add much complexity to Indiana tort law. The contributory negligence system did indeed lend itself to simplicity. Simplicity, however, is not the ultimate test of a good tort system. The simplicity of the rules of contributory negligence was purchased at a price of much harshness and injustice. The correction of that harshness and injustice was long

⁸²See *id.* at § 34-4-33-10(d).

overdue. Despite the compromises made to achieve passage of the Indiana Comparative Fault Act, it provides a workable plan which should be a marked improvement over existing law.

Indiana's Comparative Fault Law: A Legislator's View

NELSON J. BECKER*

The Indiana General Assembly passed a comparative fault act during the 1983 session. Senate Enrolled Act 287 passed the House 78-12 and passed the Senate 41-6. The Act will become effective January 1, 1985.

In the past several sessions of the Indiana General Assembly, some form of comparative fault legislation has been considered. Some proposed the pure comparative fault concept, which met with little or no success, while others attempted modified forms. The trial bar and defense bar were generally the proponents and opponents of the legislation with considerable interest being exhibited by the insurance industry. The General Assembly listened to the debate each year, but not until the 1983 session did it decide it was time to make a fundamental change in the law with respect to determining fault.

There are a number of factors that made it possible for a comparative fault act to pass. First of all, the Act is a modified form of comparative fault, not the pure form of comparative fault. Under the modified form adopted by Indiana, a plaintiff who is more than fifty percent at fault is barred from recovery. It is highly unlikely that a pure form of comparative fault, which allows recovery for a ninety-nine percent-fault plaintiff, would have been regarded as fair by the members of the Indiana General Assembly.

Secondly, comparative fault was regarded by legislators as more equitable to the slightly-at-fault plaintiff than the contributory negligence rule. Comparative fault avoids the inequity under the contributory negligence rule of totally barring recovery to a plaintiff who is slightly at fault. Many legislators felt that juries ignored the contributory negligence rule or used devices such as the doctrine of last clear chance to avoid its harsh effects. By abolishing contributory negligence, legislators felt that juries would no longer be forced to contrive ways to circumvent the harsh treatment of the slightly-at-fault plaintiff. Furthermore, legislators felt that under comparative fault, judgments would be more predictable, equitable, and less likely to breed disrespect for the law.

*Representative Becker, from Logansport, was one of the sponsors of the comparative fault bill in the Indiana General Assembly. The following Article has been reproduced with only slight modifications from the manuscript that Representative Becker submitted to the *Indiana Law Review*. It was felt that an Article from one of the sponsors of this historic legislation would be an asset to this Symposium and would provide a helpful insight into the passage of the Act.

The third reason the Comparative Fault Act passed was that opponents withdrew their active opposition. The opponents are considered knowledgeable and generally concerned with the interests of the state. Consequently, when they withdrew opposition to the Act, a number of legislators who formerly opposed comparative fault changed their position.

The opposition withdrew for several reasons. One reason was that thirty-eight states had adopted comparative fault either through legislative act or judicial mandate. A second reason was that the Indiana Court of Appeals had indicated a willingness to adopt comparative fault. The opponents realized they would have more input in a legislative enactment of comparative fault than in a judicial recognition of comparative fault. As a result, the opponents felt their best strategy was to withdraw opposition to comparative fault and work with the legislature on a bill that would address their objections to comparative fault. Finally, opposition to comparative fault was withdrawn in order to concentrate efforts on other legislation that was opposed, i.e., repeal of the guest statute, expansion of wrongful death, and pre-judgment interest.

The occurrence of a series of compromises was the fourth reason why comparative fault passed in the 1983 session. For example, the Attorney General's objections were resolved by excluding governmental units and public employees. A January 1, 1985 effective date was inserted to give the Indiana bar, the courts, and other interested parties time to fine tune the Act. The "empty chair" problem was resolved by allowing the trier of fact to assess a percentage of fault to an at-fault nonparty. And finally, the Indiana Comparative Fault Act will not discourage settlements because it does not provide the right of contribution among tortfeasors.

There were some problems with the Comparative Fault Act passed in 1983. For example, the "empty chair" problem was not completely resolved. The Act required disclosure of the name of the nonparty in order to prevent the possibility of the "phantom defendant." However, the disclosure requirement was unfair to defendants who could not identify an at-fault nonparty who had left the scene or was unaware of his fault. The 1984 amendment dropped the disclosure requirement for at-fault nonparties, as well as cleaned up some other potential problems facing the implementation of the Act.

I personally feel the Comparative Fault Act as passed in 1983 and amended by the 1984 General Assembly is a good law and a fair compromise between the opponents and proponents of the Act. Both groups have worked long and hard to make the Act workable and effective, and both groups, as well as those involved in the legislature, recognize there will be a continuing need to adjust and modify the Act as we gain experience. Only time will tell how successful the legislative system worked in establishing this new and historic concept in Indiana law.

The Indiana Comparative Fault Act: How Does It Compare With Other Jurisdictions?

DEBRA S. EASTERDAY*
THOMAS V. EASTERDAY**

I. INTRODUCTION

On January 1, 1985, comparative negligence will finally become law in Indiana.¹ The Indiana courts will face a challenging task in interpreting and applying the provisions of the Indiana Comparative Fault Act. Their primary resource for interpreting the Indiana Act may be the multitude of decisions from other jurisdictions interpreting the provisions of their respective comparative negligence laws.

This article will review decisions from other jurisdictions to show how they have applied their comparative negligence laws with regard to critical issues in civil litigation. Moreover, certain provisions of the Indiana Act will be compared with the laws of other jurisdictions in an effort to provide some guidance in construing the Indiana Comparative Fault Act.

II. OVERVIEW

To date, the vast majority of states have adopted some form of comparative negligence. These forms fall primarily into three basic categories: pure, modified, and slight-gross. The pure form provides for the apportionment of damages between a negligent defendant and a contributorily negligent plaintiff regardless of the extent to which either party's negligence contributed to the injury. Under the modified approach, however, while damages are apportioned between the parties, contributory negligence continues to be a complete defense where a plaintiff's negligence exceeds that of the defendant. Finally, under the slight-gross form of comparative negligence a plaintiff's contributory negligence will bar his recovery unless his negligence is slight and/or the defendant's negligence was gross in comparison.

*Associate with the firm of Ice, Miller, Donadio & Ryan—Indianapolis, Indiana. B.A., Hillsdale College, 1978; J.D., Indiana University School of Law, 1981.

**Majority Attorney for the Indiana Senate and Associate of Lawrence, Carter, Gresk, Leerkamp & Walsh—Indianapolis, Indiana. B.S., Indiana University, 1978; J.D., Indiana University School of Law, 1981.

¹Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 4, 1983 Ind. Acts 1930, 1931 (codified at IND. CODE § 34-4-33-4 (Supp. 1984)). In 1951, the Indiana Appellate Court declined to adopt comparative negligence in Indiana. *Lewis v. Mackley*, 122 Ind. App. 247, 253, 99 N.E.2d 442, 445 (1951).

A. *Pure Comparative Negligence*

Twelve states have adopted the pure form of comparative negligence.² This form permits a contributorily negligent plaintiff to recover damages regardless of the extent to which his negligence contributed to the injury. Thus, the doctrine of contributory negligence no longer acts as a complete bar to recovery unless the plaintiff's negligence is the sole proximate cause of the injury.³ Contributory negligence remains as a partial bar to recovery, however, to the extent that a plaintiff's negligence proportionately reduces the amount of damages attributable to the entire injury to which a non-negligent plaintiff would be entitled.⁴

Proponents of the modified comparative negligence system have criticized the pure comparative negligence rule stating that it favors the party who has incurred the most damages regardless of the degree of his negligence.⁵ To illustrate, consider a plaintiff, twenty percent at fault and suffering \$100,000 in damages, and a defendant, eighty percent at fault who has suffered only \$10,000 in damages. Under the pure form the plaintiff would recover eighty percent of his damages or \$80,000. However, suppose it was the defendant who had suffered the \$100,000 in damages and the plaintiff who had suffered only \$10,000 in damages. The plaintiff would still recover eighty percent of his damages, \$8,000, but the defendant, assuming he counterclaimed, would be able to recover from the plaintiff twenty percent of his damages or \$20,000. Critics of the pure system view this result as unfair and fear that under this scenario a plaintiff would be reluctant to file suit against a defendant even though the defendant is eighty percent at fault.⁶

The jurisdictions which have adopted the pure comparative negligence rule point out, on the other hand, that neither party escapes liability for his negligence and neither party is unjustly enriched:

How can it be argued that such a result would be unfair, when each party would be held responsible to the other for the harm

²Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982); Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981); LA. CIV. CODE ANN. art. 2323 (West Supp. 1984); MISS. CODE ANN. § 11-7-15 (1972); N.Y. CIV. PRAC. LAW & R. § 1411 (McKinney 1976); R.I. GEN. LAWS § 9-20-4 (Supp. 1983); WASH. REV. CODE ANN. § 4.22.005 (Supp. 1983). (Of the eight states adopting comparative negligence by judicial decision, only one, West Virginia, adopted a modified form.)

³See Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973).

⁴Scott v. Rizzo, 96 N.M. 682, 689, 634 P.2d 1234, 1241 (1981); see also Placek v. City of Sterling Heights, 405 Mich. 638, 660-61, 275 N.W.2d 511, 519 (1979).

⁵Bradley v. Appalachian Power Co., 256 S.E.2d 879, 883 (W. Va. 1979).

⁶*Id.* at 885 n.15. Proponents of the modified system agree that such a result would not occur under a modified rule because the defendant, being more at fault than the plaintiff, would be precluded from recovery.

caused to that other person by his proportionate fault? It surely is a fairer allocation of liability than the "modified" forms which require plaintiff to have been less negligent than or not more than equally as negligent as defendant. Those formulae punish either the plaintiff or counter-plaintiff who is but slightly more negligent with bearing his own loss and about one-half of the losses of the other party as well. . . . In cases of multiple defendants, if plaintiff's individual fault exceeds the individual degree of fault of each other defendant—even though the totality of defendants' fault exceeds plaintiff's—under the "modified" concepts, plaintiff recovers nothing.

. . . Pure comparative negligence denies recovery for one's own fault; it permits recovery to the extent of another's fault; and it holds all parties fully responsible for their own respective acts to the degree that those acts have caused harm.⁷

Thus, under the pure system each party is responsible for contributing his share of the total damages suffered by both parties' negligent acts.

Another, more realistic, objection to the pure comparative negligence rule arises when both parties have liability insurance. Then, as can be seen in the earlier example where the plaintiff suffered \$10,000 in damages and was twenty percent at fault, and the defendant was eighty percent at fault and sustained \$100,000 in damages, the benefits of pure comparative negligence would clearly flow to the insurers.⁸ Some commentators have pointed out that this flaw does not lie "in the concept of pure comparative negligence, but rather in the operation of set-off."⁹ To solve this problem, some states have statutorily precluded set-off in all circumstances,¹⁰ and some courts have precluded set-off when both parties are insured and the separate verdicts are to be paid by their respective insurance companies.¹¹ Therefore, each party would recover damages for injuries not attributable to his own fault.

B. Modified Comparative Negligence

The majority of comparative negligence states have adopted a less extreme, modified system of which there are two distinct types. Under both systems the doctrine of contributory negligence remains a complete defense to a plaintiff's recovery when the plaintiff's negligence exceeds

⁷Scott v. Rizzo, 96 N.M. 682, 690, 634 P.2d 1234, 1241-42 (1981). See also Hoffman v. Jones, 280 So. 2d 431, 439 (Fla. 1973). ("The liability of the defendant in such a case should not depend upon what damage he *suffered*, but upon what damages he *caused*."); Alvis v. Ribar, 85 Ill. 2d 1, 25, 421 N.E.2d 886, 897 (1981).

⁸In that example, defendant's insurer, because of set-off, would not have to compensate plaintiff, and plaintiff's insurer would only have to pay defendant \$12,000.

⁹Note, *Comparative Negligence*, 81 COLUM. L. REV. 1668, 1672 (1981).

¹⁰See, e.g., R.I. GEN. LAWS § 9-20-4.1 (Supp. 1983).

¹¹See, e.g., Stuyvesant Ins. Co. v. Bournazian, 342 So. 2d 471, 474 (Fla. 1976).

a designated figure. The rationale cited in support of modified systems is that a party should not be able to recover damages when he is more at fault than the party from whom he seeks recovery. As stated by the court in *Bradley v. Appalachian Power Co.*,¹² "it is difficult, on the theoretical grounds alone, to rationalize a system which permits a party who is 95 percent at fault to have his day in court as a plaintiff because he is 5 percent fault-free."¹³

The majority of states that have adopted a modified version of comparative negligence have selected a "not greater than" system.¹⁴ Under the not greater than rule, a negligent plaintiff may recover damages reduced in proportion to the percentage of negligence attributable to him provided his negligence is not greater than that of the defendant's.¹⁵ Accordingly, where a plaintiff and defendant are each fifty percent negligent, the plaintiff may recover one half of his damages.¹⁶

Under the "less than" rule, the minority approach of the two modified comparative negligence systems,¹⁷ a plaintiff may recover damages diminished in proportion to the amount of his negligence so long as his negligence is less than that of the defendant's.¹⁸ Hence, if a plaintiff and defendant were each fifty percent negligent, the plaintiff would be barred from recovery under the "less than" rule just as he would be barred under the doctrine of contributory negligence.¹⁹

¹²256 S.E.2d 879 (W. Va. 1979).

¹³*Id.* at 883.

¹⁴CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1984); HAWAII REV. STAT. § 663-31 (1976); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984); MINN. STAT. ANN. § 604.01 (West Supp. 1984); MONT. CODE ANN. § 58.607.1 (Cum. Supp. 1977); NEV. REV. STAT. § 41.141 (1973); N.H. REV. STAT. § 507:7-a (1983); N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1983); OHIO REV. CODE ANN. § 2315.19 (Page 1981); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1983); OR. REV. STAT. § 18.470 (1983); PA. STAT. ANN. tit. 42, § 7102 (Purdon 1982); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1984); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1983); WIS. STAT. ANN. § 895.045 (West 1983). This form has also been known as the "New Hampshire approach." Note, *supra* note 9, at 1673.

¹⁵See, e.g., *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974); *Becker's, Inc. v. Breyare*, 361 Mass. 117, 279 N.E.2d 651 (1972); *Dunham v. Southside Nat'l Bank*, 169 Mont. 466, 548 P.2d 1383 (1976); *Howard v. Backman*, 524 S.W. 2d 414 (Tex. Civ. App. 1975); *Shea v. Peter Glenn Shops, Inc.*, 132 Vt. 317, 318 A.2d 177 (1974); *Schuh v. Fox River Tractor Co.*, 63 Wis. 2d 728, 218 N.W.2d 279 (1974).

¹⁶See, *Leyva v. Smith*, 557 S.W.2d 169 (Tex. Civ. App. 1977).

¹⁷*Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979). ARK. STAT. ANN. §§ 27-1763 to 27-1765 (1979); COLO. REV. STAT. § 13-21-111 (1974); GA. CODE ANN. § 105-603 (1968); IDAHO CODE § 6-801 (1979); KAN. STAT. ANN. § 60-258a (Supp. 1984); ME. REV. STAT. ANN. tit. 14, § 156 (1980); N.D. CENT. CODE § 9-10-07 (1975); UTAH CODE ANN § 78-27-37 (1977); WYO. STAT. § 1-1-109 (1983). This system has also been referred to as the "Wisconsin approach," having been initiated in Wisconsin. Note, *supra*, note 9, at 1672-73. However, in 1971, the legislature amended the Wisconsin statute placing it under the not greater than rule.

¹⁸*Jackson v. Frederick's Motor Inn*, 418 A.2d 168 (Me. 1980); *Brittain v. Booth*, 601 P.2d 532 (Wyo. 1979).

¹⁹*Lee v. Howard*, 483 S.W.2d 922 (Tex. Civ. App. 1972) (applying Arkansas law).

Advocates of the pure comparative negligence rule assail the modified systems primarily on the ground that they involve the drawing of an arbitrary line beyond which contributory negligence may still be asserted as a complete bar to a plaintiff's suit.²⁰ The court in *Scott v. Rizzo*²¹ stated:

[The modified approach] "simply shifts the lottery aspect of the contributory negligence rule to a different ground." We add the "gross-slight" form of comparative negligence to that appraisal, as well. Those rules do not abrogate contributory negligence; they merely slightly reduce defendant's chances of a defense verdict if there is a showing of plaintiff's contributory negligence.²²

On the other hand, proponents of the modified systems assert that the arbitrary line argument is more theoretical than real. As the *Bradley* court discussed, it is doubtful that any jury would be able to apportion contributory negligence so closely: "In all probability, when the contributory negligence rises near the 50 percent level the jury will conclude that plaintiff is guilty of such substantial contributory negligence that it will fix his percentage at 50 or higher to bar his recovery."²³

Another criticism of the modified approach is the problem that arises where multiple defendants are present. In these cases the issue becomes whether the plaintiff's negligence should be compared with that of individual defendants or the collective negligence of all of the defendants in determining whether contributory negligence will bar the plaintiff's recovery.²⁴ Although most states deal with the problem by comparing the plaintiff's negligence with the combined defendants' negligence under the less restrictive collective negligence approach,²⁵ this issue would not arise under the pure comparative negligence rule where each party is responsible for his own negligence.

²⁰See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 827, 119 Cal. Rptr. 858, 874, 532 P.2d 1226, 1242 (1975) (The court rejected the modified system of comparative negligence because it merely shifted "the lottery aspect of the contributory negligence rule to a different ground."); *Alvis v. Ribar*, 85 Ill. 2d 1, 17, 421 N.E.2d 886, 898 (1981) (court agreed with reasoning of *Li*); *Placek v. City of Sterling Heights*, 405 Mich. 638, 660-61, 275 N.W.2d 511, 519 (1979) (quoting *Kirby v. Larson*, 400 Mich. 585, 642-44, 256 N.W.2d 400, 428 (1977)). "The rule preventing recovery if plaintiff's negligence exceeds 50% of the total fault is just as arbitrary as that which completely denies recovery. Is the person who is 49% negligent that much more deserving than the one who is 51% negligent?").

²¹96 N.M. 682, 634 P.2d 1234 (1981).

²²*Id.* at 690, 634 P.2d at 1242 (quoting *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 827, 119 Cal. Rptr. 858, 874, 532 P.2d 1226, 1242 (1975)).

²³256 S.E.2d at 884 n.12.

²⁴Note, *supra* note 9, at 1673-74.

²⁵See *Walton v. Tull*, 234 Ark. 884, 356 S.W.2d 20 (1962).

C. Slight-Gross Comparative Negligence

Under the slight-gross system, followed in Nebraska, a plaintiff's contributory negligence bars his recovery unless his negligence is slight and the defendant's negligence is gross in comparison.²⁶ Another variation of this rule is found in South Dakota, which requires the determination of a plaintiff's slight contributory negligence to be made in direct comparison with the negligence of the defendant, eliminating the need of showing the defendant's negligence to be gross.²⁷ Under both systems, slight contributory negligence as compared to the defendant's negligence varies with the facts and circumstances of each case.²⁸

D. Indiana Comparative Negligence

The Indiana legislature adopted a modified "not greater than" comparative negligence system. Under the statute, which governs any action based on fault brought to recover damages for death or personal injury and for injury to property, "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault"²⁹ However, a claimant whose contributory fault exceeds that "of all persons whose fault proximately contributed to the claimant's damages" cannot recover.³⁰ Accordingly, under the Indiana statute, a plaintiff whose negligence is equal to the defendant's negligence will not be barred from recovery but will be entitled to recover fifty percent of his damages.

The Indiana statute also provides a solution to a problem common to modified comparative law systems, that is, whether the plaintiff's negligence will be compared to the defendants' negligence collectively or individually where multiple defendants are present. Under the new statute, the plaintiff will be barred from recovery if his contributory negligence is greater than that of *all* persons whose negligence proximately contributed to the plaintiff's damages.³¹ Thus, the plaintiff's fault will be compared to that of all defendants and all "non party" tortfeasors.³²

²⁶NEB. REV. STAT. § 25-1151 (1979).

²⁷S.D. CODIFIED LAWS ANN. § 20-9-2 (1979).

²⁸See *In re Estate of Tichota*, 190 Neb. 775, 212 N.W.2d 557 (1973); *Crabb v. Wade*, 84 S.D. 93, 167 N.W.2d 546 (1969).

²⁹IND. CODE § 34-4-33-3 (Supp. 1984).

³⁰*Id.* § 34-4-33-4(a).

³¹*Id.* § 34-4-33-4(b).

³²Other states following this approach include Kansas, *Beach v. M. & N. Modern Hydraulic Press Co.*, 428 F. Supp. 956 (D. Kan. 1977); Minnesota, *Lines v. Ryan*, 272 N.W.2d 896 (Minn. 1978); and Oklahoma, *Laubach & Morgan*, 588 P.2d 1071 (Okla. 1978).

Some states compare the plaintiff's negligence with that of each individual defendant. See *Mishoe v. Davis*, 64 Ga. App. 700, 14 S.E.2d 187 (1941); *Marier v. Memorial Rescue Serv., Inc.*, 296 Minn. 242, 207 N.W.2d 706 (1973); *Van Horn v. William Blanchard*

The Indiana statute does not, however, consider how comparative fault principles should apply in derivative cases. Most jurisdictions hold that the concept of comparative negligence applies to derivative causes of action and, in determining the plaintiff's amount of recovery, will consider the negligence of the person from whom the claim is derived.³³ The Indiana courts follow this rule in contributory negligence cases.³⁴ Because there is nothing in the Indiana Comparative Fault Act indicating an intent to modify this rule, it seems likely that Indiana courts will follow the majority by applying derivative rules in comparative negligence cases.

A second area not addressed by the Indiana statute is that of set-off. This issue will arise any time a defendant counterclaims and there is a recovery by both the plaintiff and the defendant. While permitting set-off of the recoveries might appear to be equitable, the issue becomes more complex when the parties are insured.³⁵ Ideally, Indiana courts, not being restricted by provisions in the Act, will follow the lead of the Florida and California courts denying set-off in those cases where both parties are insured.³⁶

Finally, the Indiana Comparative Fault Act definitively resolves many issues that are litigated and debated in other jurisdictions. First, the Act expressly provides that it does not apply to breach of warranty cases.³⁷ Second, section 2(a) provides that the comparative negligence statute

Co., 88 N.J. 91, 438 A.2d 552 (1981); Board of County Comm'rs v. Ridenour, 623 P.2d 1174 (Wyo. 1981).

The majority of jurisdictions adopting modified comparative negligence compare the plaintiff's negligence to the defendants' negligence as a whole. *See, e.g.*, Walton v. Tull, 234 Ark. 882, 356 S.W. 2d 20 (1962). *See also* Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979); ARK. STAT. ANN. § 27-1764 (1979); CONN. GEN. STAT. ANN. § 52-572h(2) (West Supp. 1984); HAWAII REV. STAT. § 663-31(a) (1976); KAN. STAT. ANN. § 60-258a (West Supp. 1984); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984); NEV. REV. STAT. § 41.141(2)(a) (1973); OHIO REV. CODE ANN. § 2315.19(A)(1) (Page 1981); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1983); OR. REV. STAT. § 18.470 (1983); PA. STAT. ANN. tit. 42, § 7102(a) (Purdon 1982); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1984).

³³Ferguson v. Ben M. Hogan Co., 307 F. Supp. 658 (W. D. Ark. 1969) (damages reduced by wife's negligence in husband's loss of consortium action); Garrison v. Funderburk, 262 Ark. 711, 561 S.W.2d 73 (1978) (minor driver's negligence imputed to parents); Hannabass v. Florida Home Ins. Co., 412 So. 2d 376 (Fla. Dist. Ct. App. 1981) (child's negligence imputed to parents in suit by parents for medical expenses).

³⁴Bender v. Peay, 433 N.E.2d 788 (Ind. App. 1982) (contributory fault of one having primary claim is imputed to one asserting derivative claim).

³⁵*See supra* notes 8-11 and accompanying text.

³⁶Stuyvesant Ins. Co. v. Bournazian, 342 So. 2d 471 (Fla. 1976); Jess v. Herrmann, 26 Cal.3d 131, 161 Cal. Rptr. 87, 604 P.2d 208 (1979).

³⁷IND. CODE § 34-4-33-13 (Supp. 1984). Most other jurisdictions do apply comparative fault principles to breach of warranty actions. *See, e.g.*, Lesmeister v. Dilly, 330 N.W.2d 95 (Minn. 1983). *Contra* Duff v. Bonner Bldg. Supply, Inc., 103 Idaho 432, 649 P.2d 391 (1982); Correia v. Firestone Tire & Rubber Co., 388 Mass. 342, 446 N.E.2d 1033

applies in cases involving willful or wanton misconduct.³⁸ Third, the comparative fault principles will not apply to strict liability cases.³⁹ Finally, the Indiana Act does not apply in cases of intentional tort.⁴⁰

III. DEFENSES

The Indiana Comparative Fault Act could have a significant impact on the various defenses currently available under Indiana law. To aid in interpreting whether certain defenses will apply under the Indiana Comparative Fault Act, this section will review how the well-established defenses of last clear chance and assumption of risk have fared in those jurisdictions that have adopted some form of comparative negligence.⁴¹

(1983). Though, some qualify the extent of the application. *Broce-O'Dell Concrete Prod., Inc. v. Mel Jarvis Constr. Co., Inc.*, 6 Kan. App. 2d 757, 634 P.2d 1142 (1981) (comparative negligence will not apply in breach of warranty cases in which the action is only to recover the economic loss and not for injury to person or property); *Peterson v. Bendix Home Sys., Inc.* 318 N.W.2d 50 (Minn. 1982) (comparative negligence not applicable to buyer's action to recover for damages to the product itself and incidental damages).

— ³⁸IND. CODE § 34-4-33—2(a) (Supp. 1984).

³⁹IND. CODE § 34-4-33-13 (Supp. 1984). Several other jurisdictions have determined that comparative negligence is inapplicable to products liability actions because the focus of products liability is upon the product rather than the conduct of the parties or because the fault of the defendant has no bearing on his liability and, as such, cannot be compared to any fault of the plaintiff. *See Zahrt v. Sturm, Ruger & Co.*, 498 F. Supp. 389 (D. Mont. 1980); *Robinson v. Parker-Hannifin Corp.*, 4 Ohio Misc. 2d 6, 447 N.E.2d 781 (1982); *Seay v. Chrysler Corp.*, 93 Wash. 2d 319, 609 P.2d 1382 (1980). Other courts, however, have applied comparative law principles in products liability cases. *See, e.g., Stueve v. American Honda Motors Co., Inc.*, 457 F. Supp. 740 (D. Kan. 1978); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978); *Kaneko v. Hilo Coast Processing*, 65 Hawaii 447, 654 P.2d 343 (1982); *Sanford v. Chevrolet Div. of General Motors*, 292 Or. 590, 642 P.2d 624 (1982); *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301 (Utah 1981).

⁴⁰IND. CODE § 34-4-33-2(a) (Supp. 1984).

⁴¹The Indiana Comparative Fault Act will have a major impact on several frequently used defenses in addition to the two reviewed in detail in this article. For example, the "open and obvious danger rule" will be affected by the definition of "fault" in section 34-4-33-2(a) of the Act.

The "open and obvious danger rule," as set forth in *Bemis Co., Inc. v. Rubush*, 427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 103 S. Ct. 56 (1982), alleviates the manufacturer's duty to warn of a known defect if the danger is open and obvious to all. In interpreting statutory language almost identical to the language of section 34-4-33-2(a) of the Indiana Comparative Fault Act, the Minnesota Supreme Court held that the obvious nature of a products' danger is no longer an absolute defense. *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207, 213 (Minn. 1982). Similarly, the Florida Court of Appeals has held that comparative negligence standards apply to cases in which a patent danger defense is asserted. *Zambito v. Southland Recreation Enter., Inc.*, 383 So. 2d 989 (Fla. Dist. Ct. App. 1980). Therefore, the Indiana Comparative Fault Act may abolish the "open and obvious danger rule" as a complete defense.

A. Last Clear Chance

The doctrine of last clear chance allows a contributorily negligent plaintiff to recover where the defendant had knowledge of the plaintiff's perilous position, an opportunity to avoid injuring the plaintiff, and yet failed to exercise reasonable care by not avoiding the accident. This doctrine, which originated in England in 1842,⁴² has often been criticized.⁴³ However, it has been applied in several states, including Indiana.⁴⁴ Generally, those jurisdictions adopting comparative negligence have abolished the doctrine of last clear chance either by case law or by statute.

1. *Abolished by Case Law.*—The majority of jurisdictions that have adopted some form of comparative negligence have abolished the doctrine of last clear chance by case law.⁴⁵ These jurisdictions have generally determined that the underlying rationale for the doctrine of last clear chance no longer exists under comparative negligence.⁴⁶ Moreover, some jurisdictions have recognized that the doctrine of last clear chance is incompatible with the apportionment of damages under comparative

⁴²Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. D. 1842).

⁴³"No very satisfactory reason for the rule has ever been suggested." W. PROSSER, THE LAW OF TORTS § 66, at 427 (4th ed. 1971). See also Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Street v. Calvert, 541 S.W.2d 576 (Tenn. 1976). In Kaatz, the court opined, "the search for limits to the doctrine and for the proper sphere of its application has led to great confusion in the law of tort, much of which can probably never be dispelled." 540 P.2d at 1050 (footnote omitted).

⁴⁴See, e.g., Sims v. Huntington, 271 Ind. 368, 393 N.E.2d 135 (1979); McKeown v. Calusa, 172 Ind. App. 1, 359 N.E.2d 550 (1977).

⁴⁵See, e.g., Kaatz v. State, 540 P.2d 1037, 1050 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal.3d 804, 824, 532 P.2d 1226, 1240-41, 119 Cal. Rptr. 858, 872 (1975); Burns v. Ottai, 513 P.2d 469, 472 (Colo. Ct. App. 1973); Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973); Alvis v. Ribar, 85 Ill.2d 1, 28, 421 N.E.2d 886, 898 (1981); Stewart v. Madison, 278 N.W.2d 284, 293 (Iowa 1979); Cushman v. Perkins, 245 A.2d 846, 847 (Me. 1968); Davies v. Butler, 95 Nev. 763, 775-76, 602 P.2d 605, 613 (1979). Davila v. Sanders, 557 S.W.2d 770, 771 (Tex. 1977); Britton v. Hoyt, 63 Wis. 2d 688, 691, 218 N.W.2d 274, 277-78 (1974). In abolishing the doctrine of last clear chance, the Wisconsin Supreme Court declared that it was "doubtful the doctrine of last clear chance was ever the law in Wisconsin." 63 Wis. 2d at 691, 218 N.W.2d at 277.

⁴⁶See, e.g., Kaatz v. State, 540 P.2d 1037 (Alaska 1975). In Kaatz, the court said, "it is recognized by nearly all who have reflected upon the subject that the last clear chance doctrine is, in the final analysis, merely a means of ameliorating the harshness of the contributory negligence rule. Without the contributory negligence rule there would be no need for the palliative doctrine of last clear chance." *Id.* at 1050 (footnote omitted).

The Illinois Supreme Court adopted this same rationale for abolishing the doctrine of last clear chance in *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886 (1981). In *Alvis*, the court stated that "the doctrine of 'last clear chance' was created to escape the harshness of the contributory negligence rule. As the need for it disappears in the face of this decision, the vestiges of the doctrine of 'last clear chance' are hereby abolished." *Id.* at 13, 421 N.E.2d at 898.

negligence.⁴⁷ A few of these jurisdictions have, however, chosen to preserve portions of the doctrine of last clear chance to be considered by the jury in apportioning fault.⁴⁸

2. *Abolished by Statute.*—In at least two jurisdictions the doctrine of last clear chance has been abolished by statute.⁴⁹ Oregon takes the approach of complete abolition of the doctrine of last clear chance.⁵⁰ In contrast, the Connecticut comparative negligence statute contains language limiting the abolition of the doctrine of last clear chance only to actions governed by that statute.⁵¹

3. *Retained.*—The minority of jurisdictions that have adopted some form of comparative negligence have retained the doctrine of last clear chance.⁵² These jurisdictions have generally viewed the doctrine of last clear chance as a rule of proximate cause and not incompatible with comparative negligence.⁵³ A further argument raised in support of retaining the doctrine of last clear chance is that since contributory negligence still exists to a limited extent under modified comparative negligence, the doctrine of last clear chance should also survive under modified

⁴⁷See, e.g., *Kaatz v. State*, 540 P.2d 1037, 1050 (Alaska 1975); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 824, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872 (1975). In *Kaatz*, the court held that "[t]o give continued life to that principle would defeat the very purpose of the comparative negligence rule—the apportionment of damages according to the degree of mutual fault. There is, therefore, no longer any reason for resort to the doctrine of last clear chance in the courts of Alaska." 540 P.2d at 1050 (footnote omitted).

⁴⁸See, e.g., *Cushman v. Perkins*, 245 A.2d 846 (Me. 1968). In *Cushman*, the court explained its reason for the abolition of the doctrine of last clear chance:

In our view when our contributory negligence rule as an absolute bar disappeared (in cases where the plaintiff's negligence is less than defendant's) through legislative action, the last clear chance rule disappeared with it and no longer exists as an absolute rule. Its component parts—such as the degree of plaintiff's negligence, its remoteness in time, the efficiency of its causation, the degree of defendant's negligence, the efficiency of its causation, defendant's awareness of plaintiff's peril, defendant's opportunity to avoid doing damage and his failure to do so—remain as factors to be considered by the jury in measuring and comparing the parties' relative fault.

Id. at 850-51.

⁴⁹See CONN. GEN. STAT. ANN. § 52-572h(c) (West Supp. 1984); OR. REV., STAT. § 18.475(1) (1977).

⁵⁰OR. REV. STAT. § 18.475(1) (1977) states that "[t]he doctrine of last clear chance is abolished."

⁵¹CONN. GEN. STAT. ANN. § 52-572h(c) (West Supp. 1984) states that "[t]he legal doctrines of last clear chance and assumption of risk in actions to which this section is applicable are abolished."

⁵²*Tiedeman v. Chicago M.S.P.R. Co.*, 513 F.2d 1267, 1273 (8th Cir. 1975); *Underwood v. Illinois Cent. R.R. Co.*, 205 F.2d 61, 64 (5th Cir. 1953); *Southland Butane Gas Co. v. Blackwell*, 211 Ga. 665, 669-70, 88 S.E.2d 6, 10 (1955); *Bezdek v. Patrick*, 170 Neb. 522, 530-31, 103 N.W.2d 318, 325 (1960); *Vlach v. Wyman*, 78 S.D. 504, 508, 104 N.W.2d 817, 819 (1960).

⁵³See, e.g., *Vlach v. Wyman*, 78 S.D. 504, 508, 104 N.W.2d 817, 819 (1960). Several

comparative negligence.⁵⁴

4. *Last Clear Chance in Indiana.*—The Indiana Comparative Fault Act does not expressly abolish the doctrine of last clear chance.⁵⁵ Therefore, the task will probably be left to the courts to decide whether the doctrine of last clear chance has survived the adoption of comparative fault in Indiana.

The modern trend in other jurisdictions is clearly in favor of abolishing the doctrine of last clear chance.⁵⁶ An example of the evolution of this trend is found in West Virginia. In *Bradley v. Appalachian Power Co.*,⁵⁷ the West Virginia Supreme Court implied that the doctrine of last clear chance was still available in “appropriate circumstances.”⁵⁸ However, two years later, in *Ratlief v. Yokum*,⁵⁹ the West Virginia Supreme Court concluded that “the historical reason for the doctrine of last clear chance no longer exists since our adoption of comparative negligence.”⁶⁰ The court further said that “the better course would be to abolish the use of the doctrine of last clear chance for the plaintiff.”⁶¹

The sentiment expressed by the West Virginia Supreme Court in *Ratlief* is a reflection of Dean Prosser's view that the doctrine of last clear chance has outlived its usefulness.⁶² Dean Prosser's opinion has recently been echoed by the Michigan Court of Appeals in *Bell v.*

courts have taken the opposite position and have held that the doctrine of last clear chance is incompatible with the apportionment of damages under comparative negligence. See *supra* note 45. See also *Danculovich v. Brown*, 593 P.2d 187 (Wyo. 1979). In *Danculovich*, the court used the following example to express its opinion that the doctrine of last clear chance cannot logically be applied under comparative negligence:

If the jury found two causes directly contributing to the damages, it would determine the relative degrees of negligence accordingly, including consideration of the elements of the last clear chance. It would be illogical to have the jury first determine that plaintiff and defendant were both negligent (including the element of direct causation of the damage), and then—under the last clear chance theory—again address the question indirectly by considering whether or not plaintiff's negligence was the *sole* proximate cause of the damage.

Id. at 195.

⁵⁴See *Bezdek v. Patrick*, 167 Neb. 754, 756-57, 94 N.W.2d 482, 486 (1959).

⁵⁵IND. CODE § 34-4-33-1 to -13.

⁵⁶Since 1975, six jurisdictions have specifically addressed the issue of the applicability of last clear chance under comparative negligence; all six have favored the abolition of the doctrine. See *Alvis v. Ribar*, 85 Ill. 2d 1, 28, 421 N.E.2d 886, 898 (1981); *Stewart v. Madison*, 278 N.W.2d 284, 293 (Iowa 1979); *Davies v. Butler*, 95 Nev. 763, 775-76, 602 P.2d 605, 613 (1979); *Davila v. Sanders*, 557 S.W.2d 770, 771 (Tex. 1977); *Ratlief v. Yokum*, 280 S.E.2d 584, 589 (W. Va. 1981); *Danculovich v. Brown*, 593 P.2d 187, 195 (Wyo. 1979).

⁵⁷256 S.E.2d 879 (W. Va. 1979).

⁵⁸*Id.* at 887.

⁵⁹280 S.E.2d 584 (W. Va. 1981).

⁶⁰*Id.* at 589.

⁶¹*Id.*

⁶²W. PROSSER, THE LAW OF TORTS § 66, at 427-33 (4th ed. 1971).

Merritt.⁶³ This would seem to be the logical conclusion for the Indiana courts to reach based upon the adoption of comparative fault in Indiana.

The abolition of the doctrine of last clear chance in Indiana would not necessarily mean the end of all consideration of that doctrine. Some may advocate that Indiana courts should at least preserve the consideration by the jury of some of the doctrine's component parts. The Supreme Court of Maine took this approach when it abolished Maine's doctrine of last clear chance in *Cushman v. Perkins*.⁶⁴ However, Indiana courts will probably follow the majority and abolish the doctrine completely, while allowing the underlying theory of the doctrine to be argued at trial in persuading the jury that one party is more at fault under Indiana law.⁶⁵

B. Assumption of Risk

The term assumption of risk has been defined in numerous ways, leading to considerable confusion.⁶⁶ To alleviate this confusion, assumption of risk is generally separated into two distinct categories: express and implied.⁶⁷ Express assumption of risk occurs when a plaintiff expressly agrees by contract or otherwise to accept a risk of harm arising from the defendant's negligent or reckless conduct.⁶⁸ Implied assumption of risk occurs when a plaintiff does not expressly agree to assume a risk of harm, but he fully understands the risk of harm and voluntarily chooses to enter or remain within the area of that risk.⁶⁹

In Indiana, assumption of risk is categorized in a somewhat different

⁶³118 Mich. App. 414, 420, 325 N.W.2d 443, 446 (1982).

⁶⁴245 A.2d 846, 850-51 (Me. 1968).

⁶⁵See *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975). In *Kaatz*, the court noted: This is not to say that the notion of last clear chance is unavailable as a matter of trial court advocacy. Either party may attempt to persuade the trier of fact that one party or another should bear a greater proportion of the liability for an accident by reason of the factual pattern adduced, including a consideration of the helplessness or inattentiveness which may have led to a plaintiff's predicament, with subsequent injury at the hands of a negligent defendant. *Id.* at 1050 n.32.

⁶⁶See, e.g., RESTATEMENT (SECOND) OF TORTS § 496A comment c (1965); *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54 (1943) (Frankfurter, J., concurring); *Moore v. Burton Lumber & Hardware Co.*, 631 P.2d 865 (Utah 1981). In his concurring opinion in *Tiller*, Justice Frankfurter noted:

The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas.

318 U.S. at 68.

⁶⁷See F. HARPER AND F. JAMES, *THE LAW OF TORTS* 1162 (1956).

⁶⁸RESTATEMENT (SECOND) OF TORTS § 496B (1965).

⁶⁹*Id.* § 496C.

manner; Indiana courts recognize a distinction between assumed risk and incurred risk.⁷⁰ Incurred risk differs from assumed risk only in that assumed risk is predicated on the existence of a contractual relationship while incurred risk is noncontractual.⁷¹ The doctrine of incurred risk is applicable when two elements are present. First, the plaintiff must act voluntarily. Second, the plaintiff must know and understand (or, in the exercise of reasonable care, should know and understand) the risk to which he voluntarily exposes himself.⁷² It has also been stated that incurred risk is a species of contributory negligence in Indiana.⁷³

Many jurisdictions had abolished some form of assumption of risk prior to adopting comparative negligence.⁷⁴ In those jurisdictions that had retained assumption of risk, the adoption of comparative negligence has had a divergent impact.

1. *Abolished or Merged by Case Law.*—The leading approach in those jurisdictions that have adopted some form of comparative negligence has been to abolish the doctrine of assumption of risk or merge it into contributory negligence through case law.⁷⁵ The primary reason for merging assumption of risk with contributory negligence is that it would be inequitable to apportion fault when contributory negligence exists and to bar recovery when a plaintiff has assumed a known risk.⁷⁶

⁷⁰See, e.g., *Petroski v. Northern Indiana Pub. Serv. Co.*, 171 Ind. App. 14, 354 N.E.2d 736 (1976); *Coleman v. DeMoss*, 144 Ind. App. 408, 246 N.E.2d 483 (1969).

⁷¹*Fruehauf Trailer Div. v. Thornton*, 174 Ind. App. 1, 366 N.E.2d 21 (1977); *Stallings v. Dick*, 139 Ind. App. 118, 210 N.E.2d 82 (1965).

⁷²*Sullivan v. Baylor*, 163 Ind. App. 600, 325 N.E.2d 475 (1975). In *Sullivan*, the plaintiff was assisting his neighbor in raising a basketball goal post. The plaintiff was aware of the risk that the post might fall as he positioned himself with a board for the purpose of balancing the goal post. As the goal post began to fall, the plaintiff turned and ran. After he tripped over another board, the goal post fell on his right ankle. The court held that the plaintiff incurred the risk of his injuries as a matter of law.

⁷³*Rouch v. Bisig*, 147 Ind. App. 142, 258 N.E.2d 883 (1970).

⁷⁴See, e.g., *Leavitt v. Gillaspie*, 443 P.2d 61, 68 (Alaska 1968); *Felgner v. Anderson*, 375 Mich. 23, 55-57, 133 N.W.2d 136, 153 (1965); *Bolduc v. Crain*, 104 N.H. 163, 166-67, 181 A.2d 641, 644 (1962).

⁷⁵See, e.g., *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 824-25, 532 P.2d 1226, 1240-41, 119 Cal. Rptr. 858, 872-73 (1975); *Blackburn v. Dorta*, 348 So. 2d 287, 293 (Fla. 1977); *Wilson v. Gordon*, 354 A.2d 398, 401-02 (Me. 1976); *Wentz v. Deseth*, 221 N.W.2d 101, 104-05 (N.D. 1974); *Farley v. MM Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975); *Lyons v. Redding Constr. Co.*, 83 Wash. 2d 86, 94-96, 515 P.2d 821, 826 (1973); *Brittain v. Booth*, 601 P.2d 532, 534 (Wyo. 1979).

⁷⁶See *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977). In *Blackburn*, the court reasoned:

Is liability equated with fault under a doctrine which would totally bar recovery by one who voluntarily, but reasonably, assumes a known risk while one whose conduct is unreasonable but denominated "contributory negligence" is permitted to recover a proportionate amount of his damages for injury? Certainly not. Therefore, we hold that the affirmation defense of implied assumption of risk is merged into the defense of contributory negligence and the principles of

The primary reasons for abolishing assumption of risk have either been judicial interpretation of legislative intent,⁷⁷ or simply recognition that assumption of risk should be treated like any other form of contributory negligence when apportioning fault under the respective comparative negligence statute.⁷⁸

2. *Abolished or Merged by Statute.*—Several jurisdictions have abolished the doctrine of assumption of risk or merged it into contributory negligence by statute.⁷⁹ These jurisdictions have either expressly abolished it⁸⁰ or have made it only a factor in apportioning fault.⁸¹ Merging assumption of risk into contributory negligence is accomplished by including assumption of risk within the meaning of contributory negligence.⁸²

3. *Retained.*—A minority of jurisdictions have retained assumption of risk as a complete defense despite their adoption of some form of comparative negligence.⁸³ The basic argument supporting this position is that the defense of assumption of risk is not based on fault but upon knowledge and consent, so that apportioning damages on the basis of fault is not appropriate.⁸⁴

comparative negligence enunciated in *Hoffman v. Jones*, supra, shall apply in all cases where such defense is asserted.

Id. at 293.

⁷⁷See, e.g., *Wilson v. Gordon*, 354 A.2d 398 (Me. 1976); *Wentz v. Deseth*, 221 N.W.2d 101 (N.D. 1974); *Brittain v. Booth*, 601 P.2d 532 (Wyo. 1979).

⁷⁸See *Kopischke v. First Continental Corp.* 187 Mont. 471, 610 P.2d 668 (1980). In *Kopischke*, the court stated that "we will follow the modern trend and treat assumption of the risk like any other form of contributory negligence and apportion it under the comparative negligence statute." *Id.* at 507, 610 P.2d at 687.

⁷⁹See, e.g., ARK. STAT. ANN. § 27-1763 (1979); CONN. GEN. STAT. ANN. § 52-572h(c) (West Supp. 1984); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984); N.Y. CIV. PRAC. LAW & R. § 1411 (McKinney 1976); UTAH CODE ANN. § 78-27-37 (1977).

⁸⁰See, e.g., CONN. GEN. STAT. ANN. § 52-572h(c) (West Supp. 1984); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984).

⁸¹See, e.g., ARK. STAT. ANN. § 27-1763 (1979); N.Y. CIV. PRAC. LAW & R. § 1411 (McKinney 1976).

⁸²See, e.g., UTAH CODE ANN. § 78-27-37 (1977).

⁸³See, e.g., *Yankey v. Battle*, 122 Ga. App. 275, 176 S.E.2d 714 (1970); *Blum v. Brichacek*, 191 Neb. 457, 215 N.W.2d 888 (1974); *Bartlett v. Gregg*, 77 S.D. 406, 92 N.W.2d 654.

⁸⁴V. SCHWARTZ, COMPARATIVE NEGLIGENCE, § 9.3 (1974). See also *Kennedy v. Providence Hockey Club, Inc.*, 119 R.I. 70, 376 A.2d 329 (1977). In *Kennedy*, the court specifically addressed the issue of retaining the doctrine of assumption of risk under comparative negligence. The court retained the doctrine:

Negligence analysis, couched in reasonable man hypotheses, has no place in the assumption of the risk framework. When one acts knowingly, it is immaterial whether he acts reasonably. The postulate, then, that assumption of the risk is merely a variant of contributory fault, is not, to our minds, persuasive. Ac-

4. *Assumption of Risk in Indiana.*—As previously noted, Indiana has divided the defense of assumption of risk into two distinct categories: assumed risk and incurred risk.⁸⁵ The Indiana Comparative Fault Act follows the statutes of several other jurisdictions⁸⁶ in using the definition of “fault” to determine whether assumption of risk is retained.⁸⁷ The language in the Indiana Comparative Fault Act is derived from the Uniform Comparative Fault Act.⁸⁸ Yet, the Indiana statute specifically includes “incurred risk” in the definition of “fault.”⁸⁹ This inclusion of “incurred risk” in the definition of “fault” abolishes incurred risk as a complete bar to recovery and places it as a factor in apportioning fault.

Assumed risk may survive in some form under the definition of fault in the Indiana statute, as the definition includes only “unreasonable assumption of risk not constituting an enforceable express consent.”⁹⁰ Thus, it is apparent that the Indiana Comparative Fault Act provides ample guidance for Indiana courts with respect to the doctrine of assumption of risk.

IV. MULTIPLE DEFENDANTS

Under traditional common law principles joint tortfeasors are jointly and severally liable with no right to contribution. Thus, a plaintiff may sue one or more joint tortfeasors and if a joint judgment is obtained, the plaintiff may collect the entire amount from any one of the defendants.⁹¹ Under such circumstances, most states either do not permit contribution among the joint tortfeasors or hold that a defendant is not entitled to contribution until he has paid more than his equitable share of the recovery.⁹² Yet, these principles clash with the overall goal of

cordingly, it is our determination that [the comparative negligence statute] does not affect the validity of assumption of risk as a complete bar to recovery.

119 R.I. at 77, 376 A.2d at 333.

⁸⁵See *supra* notes 70-73 and accompanying text.

⁸⁶See, e.g., ARK. STAT. ANN. § 27-1763 (1979); MINN. STAT. ANN. § 604.01 (West Supp. 1984).

⁸⁷IND. CODE § 34-4-33-2(a) (Supp. 1984). This section defines “fault” as follows: “Fault” includes any act or omission that is negligent, willful, wanton, or reckless toward the person or property of the actor or others, but does not include an intentional act. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.

⁸⁸UNIF. COMPARATIVE FAULT ACT § 1(b), 12 U.L.A. 36 (Supp. 1983).

⁸⁹IND. CODE § 34-4-33-2(a); see *supra* note 87.

⁹⁰IND. CODE § 34-4-33-2(a). For a discussion of how this section of the Indiana Comparative Fault Act affects the “open and obvious danger rule” in Indiana, see *supra* note 41.

⁹¹W. PROSSER, THE LAW OF TORTS, § 47 (4th ed. 1971).

⁹²See *Royal Indem. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975).

comparative negligence which seeks to apportion damages and responsibility among the appropriate parties.

A. Joint and Several Liability

Many state courts have held that, after the adoption of comparative negligence, the doctrine of comparative negligence does not warrant abolition of joint and several liability of concurrent tortfeasors.⁹³ In *American Motorcycle Association v. Superior Court of Los Angeles County*,⁹⁴ the California Supreme Court cited several reasons for such a conclusion. First, joint and several liability does not conflict with the comparative negligence system. Second, the ability to apportion fault on a comparative basis does not render an indivisible injury divisible for purposes of the joint and several liability rule. Third, the fact that one defendant is insolvent should not operate to relieve another defendant of liability for damages that he proximately caused. Finally, because a plaintiff's negligence relates to his failure to use due care for his own protection and a defendant's negligence relates to a lack of due care for the safety of others, a plaintiff's culpability is not equivalent to that of a defendant and public policy dictates that he should not be deprived of his right to damages.⁹⁵

In fact, consistent with the views expressed by the California court, many state statutes expressly provide that each defendant will be jointly and severally liable for the plaintiff's entire award.⁹⁶ Also, the courts of most comparative negligence jurisdictions whose statutes are silent regarding the issue have retained joint and several liability principles.⁹⁷ Nevertheless, a few states have abolished joint and several liability in

⁹³*American Motorcycle Ass'n. v. Superior Court of Los Angeles County*, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978).

⁹⁴20 Cal.3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978).

⁹⁵*Id.* at 582, 586, 588, 146 Cal. Rptr. at 184, 188-189, 578 P.2d at 901, 905-906. See also *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426 (Alaska 1979); *Weeks v. Feltner*, 99 Mich. App. 392, 297 N.W.2d 678 (1980).

⁹⁶IDAHO CODE §§ 6-803(3), 6-804 (1979). See also *Tucker v. Union Oil Co. of California*, 100 Idaho 590, 603 P.2d 156 (1979). The court, noting that Idaho Code sections 6-803(3) and 6-804 make clear that joint and several liability is retained under comparative negligence, rejected a tortfeasor's contention that its liability for damages should be based on its proportionate share of fault. See also ME. REV. STAT. ANN. tit. 14, § 156 (1980); MONT. CODE ANN. § 58-607.2 (Supp. 1977); N.J. STAT. ANN. § 2A:15-5.3 (West Supp. 1983); N.D. CENT. CODE § 9-10-07 (1975); PA. STAT. ANN. tit. 42, § 7102 (Purdon 1982); UTAH CODE ANN. § 78-27-40 (1977); WYO. STAT. § 1-1-110 (1977).

While the statutes of Louisiana, Oregon, and Texas provide for joint and several liability, they also limit the liability of a defendant whose fault is less than the plaintiff's to that position attributable to that defendant. LA. CIV. CODE ANN. art 2324 (West Supp. 1984); OR. REV. STAT. § 18.458(2) (1983); TEX. REV. CIV. STAT. ANN. art 2212a (Vernon Supp. 1984).

⁹⁷*Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426 (Alaska 1979); *Wheeling Pipe Line, Inc. v. Edrington*, 259 Ark. 600, 535 S.W.2d 225 (1976); *American Motorcycle Ass'n v. Superior Court of Los Angeles County*, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978); *Martiney v. Stefanich*, 195 Colo. 341, 577 P.2d 1099 (1978); *Lincenberg*

comparative negligence actions, ruling that each defendant is severally liable to the plaintiff only for that percentage of the award which is equivalent to the percentage of his causal negligence.⁹⁸ The Supreme Court of Oklahoma also abandoned joint and several liability, holding that where a jury apportioned fault among co-defendants, each was liable only for that portion of the award attributable to him. The court concluded that several liability more accurately conformed to the underlying principle of comparative negligence by assigning responsibility and liability for damages in direct proportion to the respective fault of each person whose negligence caused the damage.⁹⁹

The Indiana statute does not expressly consider the operation of joint and several liability principles. Arguably, though, the statute does effectively eliminate joint and several liability. Section 5(b)(4) directs the jury to multiply the percentage of fault of *each* defendant by the amount of damages and to "enter a verdict against *each* such defendant . . . in the amount of the product of the multiplication of each defendant's percentage of fault times the amount of damages."¹⁰⁰ Directing the jury to assess verdicts against each defendant's individual percentage of fault, rather than directing the jury to enter a single verdict in favor of the plaintiff less the plaintiff's proportionate share of fault, would seem to preclude the operation of the joint and several liability doctrine.¹⁰¹

v. Issen, 318 So. 2d 386 (Fla. 1975); Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 256 S.E.2d 916 (1979); Weeks v. Feltner, 99 Mich. App. 392, 297 N.W.2d 678 (1980); Saucier v. Walker, 203 So.2d 299 (Miss. 1967); Royal Indem. Co. v. Aetna Cas. & Sur. Co., 193 Neb. 752, 229 N.W.2d 183 (1975); Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972); Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 588 P.2d 1308 (1978); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979); Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp., 96 Wis. 2d 314, 291 N.W.2d 825 (1980).

⁹⁸NEV. REV. STAT. § 41.141(3) (1979); N.H. REV. STAT. ANN. § 507:7-a (Supp. 1983); OHIO REV. CODE ANN. § 2315.19(A)(2) (Page 1981); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1983).

⁹⁹Laubach v. Morgan, 588 P.2d 1071, 1075 (Okla. 1978). The Oklahoma Supreme Court later clarified its decision, stating that this ruling was completely limited to cases in which the plaintiff was also partially at fault. Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (Okla. 1980). Some of the reasons given in the *Laubach* decision for eliminating joint liability were: (1) it eliminates the need for the additional litigation involved in contribution suits; (2) it simplifies the trial of comparative negligence suits, apparently by allowing "a simple general verdict between plaintiff and each defendant"; (3) it better satisfies the objective of plaintiff collecting his damages from the defendant who is responsible for them; (4) it satisfies the need for apportionment without invading the legislature's prerogative to decide about contribution.

¹⁰⁰IND. CODE § 34-4-33-5(b)(4) (Supp. 1984).

¹⁰¹This conclusion would be consistent with the apportionment purpose of comparative negligence, especially in light of the Act's express preclusion of contribution among joint tortfeasors. If the doctrine of joint and several liability were followed, one defendant could be required to pay more than his proportionate share without the ability to seek contribution from his joint tortfeasors. Such a result would contradict the goals of comparative negligence.

B. Contribution

Many states adopting comparative negligence systems have also retained contribution rules. Traditionally, contribution has been based on a pro rata system—that is, the fact that the negligence of one tortfeasor may be greater than that of another does not change the method of apportioning contribution and, thus, all tortfeasors who are jointly and severally liable to the plaintiff share equally in liability for damages.¹⁰² The significance of a jurisdiction's retention of this method of contribution is more telling when it is considered in conjunction with the rule of joint and several liability. Under that rule, generally followed in most comparative negligence states, each tortfeasor will be liable to the plaintiff for the plaintiff's entire loss. Under pro rata contribution, though, damages are apportioned equally among the tortfeasors and, accordingly, a less culpable tortfeasor may be considered equally liable with a tortfeasor who is actually found to be more culpable. The inconsistency of this result with the apportionment policies of comparative negligence is obvious.

As a result, some jurisdictions have adopted a comparative contribution approach, either by statute¹⁰³ or by judicial decision,¹⁰⁴ in which damages are apportioned among tortfeasors according to their relative degrees of fault. A few states, though, have taken a different approach and have replaced the rule of joint and several liability with a rule that each multiple tortfeasor will be liable to the plaintiff only for the relative degree of fault attributable to that tortfeasor,¹⁰⁵ thereby eliminating the need for contribution in comparative negligence cases.

It appears that the Indiana statute follows the latter approach. Section 7 of the Act provides that, although rights of indemnity are not affected, there is no right of contribution among tortfeasors in comparative negligence cases.¹⁰⁶ Further, the Act requires the finder of fact to determine

¹⁰²See, e.g., ALASKA STAT. §§ 09.16.010(a), (b), 09.16.020(1) (1983); GA. CODE ANN. §§ 105-2011, 2012 (Supp. 1982); MASS. GEN. LAWS ANN., ch. 231B, § 2 (West Supp. 1984); MISS. CODE ANN. § 85-5-5 (1972).

¹⁰³See e.g., MONT. CODE ANN. § 27-1-703 (1983); N.J. STAT. ANN. §§ 2A:15-5.2, 5.3 (West Supp. 1984); N.Y. CIV. PRAC. LAW R. §§ 1401-1403 (McKinney 1976); N.D. CENT. CODE § 9-10-07 (1975); PA. STAT. ANN. tit. 42, § 7102(b) (Purdon 1982); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1984).

¹⁰⁴See, e.g., *Packard v. Whitten*, 274 A.2d 169 (Me. 1971); *Bartels v. City of Williston*, 276 N.W.2d 113 (N.D. 1979); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979). Other states have used a modified indemnity approach to avoid traditional contribution rules. See *American Motorcycle Ass'n v. Superior Court of Los Angeles County*, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978); *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

¹⁰⁵See KAN. STAT. ANN. § 60-258a(d) (Supp. 1984); N.H. REV. STAT. ANN. § 507:7-a (1983); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1983).

¹⁰⁶IND. CODE § 34-4-33-7.

and enter individual verdicts against each defendant,¹⁰⁷ indicating several liability of each defendant only for the percentage of damages attributable to him. Therefore, not only does the Indiana Act not permit contribution among joint tortfeasors, the Act has eliminated the need for it.

V. CONCLUSION

The Indiana legislature made it clear in the language of the Indiana Comparative Fault Act that the Act does not apply to governmental entities¹⁰⁸ nor does it apply to any civil action that accrues prior to January 1, 1985.¹⁰⁹ Most of the other sections of the Act will be subject to judicial interpretation of legislative intent.

This Article has presented an overview of several key aspects of the Indiana Comparative Fault Act and how other jurisdictions have interpreted similar provisions in their comparative negligence laws. While it is difficult to predict which side of a particular issue the Indiana courts will take in interpreting the Indiana Act, it is well established in the rules of statutory construction that the judicial interpretation of a similar statute of another jurisdiction can be used to ascertain the meaning of an Indiana statute.¹¹⁰ Therefore, this overview and comparison should lend some guidance in determining the precise impact of the Indiana Comparative Fault Act.

¹⁰⁷*Id.* § 34-4-33-5(b)(4), (c).

¹⁰⁸*Id.* § 34-4-33-8.

¹⁰⁹*Id.* § 34-4-33-13. In several jurisdictions the comparative negligence statute was silent as to precisely what actions were affected. The majority of these jurisdictions held that the statute did not apply retroactively. *See, e.g.,* Reddell v. Norton, 225 Ark. 643, 285 S.W.2d 328 (1955); Dunham v. Southside Nat'l Bank, 169 Mont 466, 548 P.2d 1383 (1976). At least one jurisdiction held that the statute did apply retroactively. *See* Godfrey v. State, 84 Wash. 2d 959, 530 P.2d 630 (1975). At least one jurisdiction has allowed retroactivity in interpreting a set effective date. *See* Peterson v. Minneapolis, 285 Minn. 282, 173 N.W.2d 353 (1969).

¹¹⁰*See* Witherspoon v. Salm, 251 Ind. 575, 243 N.E.2d 876 (1969); Ross v. Schubert, 180 Ind. App. 402, 388 N.E.2d 623 (1979). "It is also permissible to consider the notes of the Commissioners of Uniform Laws when construing a uniform statute." Eads v. J. & J. Sales Corp., 257 Ind. 485, 491, 275 N.E.2d 802, 806 (1971) (citation omitted).

Comparative Fault and the Nonparty Tortfeasor

LEONARD E. EILBACHER*

I. INTRODUCTION

The cornerstone principle of a comparative fault system is that each person who contributes to cause an injury must bear the burden of reparation for that injury in exact proportion to his share of the total fault which contributed to cause the injury. However, as the trial lawyer is often reminded, all the tortfeasors are not always in court. That is, for the variety of reasons discussed below, often not all of the tortfeasors are joined as parties to the suit for damages for the injury. Nevertheless, in order to achieve a fair distribution of the financial burden in a true comparative fault system, it is imperative that the fault of all culpable actors, whether or not they are parties to the legal action, be measured and assigned. To the extent that a given legal system ignores the fault of any tortfeasor, and shifts the financial burden from one culpable person to another, the fundamental principle of comparative fault is compromised. Thus, the manner in which a given comparative fault system addresses the issue of allocation of fault and responsibility for damages to the nonparty tortfeasor¹ provides the measure of fairness of that system of loss distribution.

*Partner with the firm of Hunt, Suedhoff, Borrer & Eilbacher—Fort Wayne, Indiana. B.S., Indiana University, 1962; J.D. Indiana University, 1965.

¹A caveat is in order with respect to the use of the term "tortfeasor" in describing defendants and nonparties. The Indiana Comparative Fault Act does not use this term. In describing and evaluating a system of loss distribution which allocates a percentage of fault to a nonparty, with a commensurate reduction of plaintiff's recovery, one risks a clouding of the issues under consideration to refer to such nonparty as a tortfeasor. The term suggests a comparison between the conduct of an innocent plaintiff and a party tainted by the image of moral wrongdoing. It must be remembered that under comparative fault, the plaintiff also may be a tortfeasor, but may still have the right to recover. As one writer reminds us, the parties may be in *pari delicto*, and one simply is called a plaintiff because he won the race to the courthouse. Goldenberg & Nicholas, *Comparative Liability Among Joint Tortfeasors: The Aftermath of Li v. Yellow Cab Co.*, 8 U. WEST L.A. L. REV. 23, 29 (1976). Thus, the analytical process must not favor one party to the legal action over another simply by reason of the label which the party or nonparty bears. All tortfeasors, be they plaintiffs, defendants, or nonparties, are entitled to equal consideration. However, the Supreme Court of California still insists on attaching the characteristic of moral breach to a defendant's actions:

Moreover, even when a plaintiff is partially at fault for his own injury, a plaintiff's culpability is not equivalent to that of a defendant. In this setting, a plaintiff's negligence relates only to a failure to use due care for his own

It is readily seen that the Indiana nonparty provision² has significantly altered the distribution of the burden of plaintiff's injury and damages and has shifted a substantial risk of non-recovery to the plaintiff.

protection, while a defendant's negligence relates to a lack of due care for the safety of others.

American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 589, 578 P.2d 899, 906, 146 Cal. Rptr. 182, 189 (1978).

²The operative provisions of the Indiana Comparative Fault Act unequivocally provide that the fault of nonparties is to be apportioned along with the defendants, and that the plaintiff may recover so long as his fault is not greater than the total fault of all actors in the incident. Each defendant shall be liable only for the proportion of total damages which corresponds to his respective percentage of total fault. The Act provides:

(1) The jury shall determine the percentage of fault of the claimant, of the defendant, and of any person who is a nonparty. The percentage of fault figures of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties.

(2) If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant's death, injury, or property damage, the jury shall return a verdict for the defendant and no further deliberation of the jury is required.

(3) If the percentage of fault of the claimant is not greater than fifty percent (50%) of the total fault, the jury then shall determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.

(4) The jury next shall multiply the percentage of fault of each defendant by the amount of damages determined under subdivision (3) and shall enter a verdict against each such defendant. . . .

IND. CODE § 34-4-33-5 (Supp. 1984).

The Act then goes on to define "nonparty" as a "person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant. A nonparty shall not include the employer of the claimant." *Id.* § 34-4-33-2(a). The Act is unlike the provisions of some states in that the apportionment scheme does not require joinder in order to determine the fault of the nonparty.

In its originally enacted form, the Act embraced the principle of fair allocation nearly absolutely. It boldly provided that the trier of fact was to consider the fault of all tortfeasors:

(1) The jury shall determine the percentage of fault of the claimant, of the primary defendant, and *of any person who is not a party to the litigation* and whose fault approximately contributed to cause the death, injury or property damages for which suit is brought. The percentage of fault figures of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from persons *who are not parties to the action*.

IND. CODE § 34-4-33-5(b)(1) (Supp. 1983) (emphasis added) (amended 1984). However, before the prospective date on which the Act was to become effective, the legislature substantially diluted the nonparty provision by a new section which stated that "[t]he jury shall determine the percentage of fault of the claimant, of the defendant, and of any person who is a *nonparty*." IND. CODE § 34-4-33-5(a)(1) (Supp. 1984) (emphasis added). The thrust of the amendment is that in order for a culpable nonparty to be assigned fault by the trier of fact, such person must be subject to liability by civil action

in some forum.

It serves no purpose to speculate as to the motivation for the amendment, but the effect is clear. The inequities of the traditional tort system are perpetuated in some instances. An unequal financial burden may be borne by certain culpable parties, while others, such as immune tortfeasors and employers, are excused from reparation for their wrongs.

In fairness to the legislature, it must be recognized that the Indiana Act is unique in that it is the first comparative fault legislation among the states which addresses statutorily the involvement of the nonparty tortfeasor in the apportionment scheme. As recently as 1974, one commentator observed:

Where one or more joint tortfeasors are not parties to a negligence action under comparative negligence, it is important to determine whether the comparison will include the negligence of the absent tortfeasors or will be made solely with regard to the parties to the actions. None of the comparative negligence statutes answers this question with precision.

V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 16.5 (3d ed. 1974).

That is not to say that the comparison of the nonparty's fault had not been permitted by judicial decision in some jurisdictions which had adopted a system of comparative fault. For example, Wisconsin, as early as 1934, held it to be error to instruct the jury to compare the plaintiff's negligence with that of the in-court defendant only. *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934). But no state had adopted such provision by statute before the Indiana enactment of 1983. Instead, the courts of a number of states had struggled with the question, with diverse results. Illustrative is the experience of the Kansas judicial process in dealing with its 1974 comparative negligence act, KAN. STAT. ANN. § 60-258a (1976), which is silent as to the role of the nonparty tortfeasor. *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978), involved a suit for property damage arising out of an auto collision. The plaintiff-father, as bailor of his Jaguar automobile to his nonparty son, sued only Keill for damage to the car as a result of a collision between the Jaguar, driven by plaintiff's son, and the auto driven by Keill. *Id.* at 196, 580 P.2d at 869. It is important to note that Kansas had traditionally followed the rule of joint and several liability, so that any one of multiple tortfeasors would be severally liable for all the plaintiff's damages. *Id.* at 203, 580 P.2d at 874. In a bench trial, the lower court boldly considered the fault of the bailee-son and ruled that he was responsible for ninety percent (90%) of the causal negligence and the defendant for only ten percent (10%) of the causal negligence, and awarded plaintiff only ten percent (10%) of his total damages. *Id.* at 196-97, 580 P.2d at 869. From such an inauspicious factual setting, a major legal battle erupted. Plaintiff appealed, and the Kansas Trial Lawyers Association filed its brief as *amicus curiae*. The defendant answered, and the Kansas Association of Defense Counsel also briefed the issues as *amicus curiae*. By its unanimous decision, the Kansas Supreme Court affirmed the abolition of the doctrine of joint and several liability from its comparative negligence scheme, and adopted the rule that the causal negligence of the nonparty is, indeed, to be compared. *Id.* at 206, 580 P.2d at 875.

Other states have reached the same result. The oft-cited Wisconsin Supreme Court earlier had recognized unequivocally the importance of the all-inclusory rule:

It is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tortfeasors either by operation of law or because of a prior release.

Connar v. West Shore Equip., 68 Wis. 2d 42, 44-45, 227 N.W.2d 660, 662 (1975). It is self-evident that true apportionment cannot be achieved unless the fault of all tortfeasors

II. DOCTRINE OF JOINT AND SEVERAL LIABILITY ABOLISHED

The principal difference between the Indiana system and that of other comparative fault states is that most states have retained the doctrine of joint and several liability, and permit an action for *comparative* contribution by a judgment debtor against the tortfeasor who has not been sued.³ In these jurisdictions, the plaintiff is assured of recovery of all his damages, since he will be awarded a judgment which is fully

is included, an objective equated by the Court of Appeals of New Mexico with a basic premise of our judicial system: "Fairness dictates that the blameworthiness of all actors in an incident be treated on a consistent basis." *Bartlett v. New Mexico Welding Supply*, 98 N.M. 152, 158, 646 P.2d 579, 585 (1982).

Similarly, the Oklahoma Supreme Court, in holding that nonparty tortfeasors were essential to the apportionment scheme, identified the shortcoming of a loss apportionment system which ignores nonparty tortfeasors:

To limit the jury to viewing the negligence of only one tortfeasor and then ask it to apportion that negligence to the overall wrong is to ask it to judge a forest by observing just one tree. It cannot, and more importantly should not, be done. It simply is not fair to the tortfeasor which plaintiff chooses to name in his lawsuit.

Paul v. N.L. Industries, 624 P.2d 68, 70 (Okla. 1980). Thus, while the Indiana system is unique in that the *legislature* has provided for the inclusion of nonparties in the apportionment scheme, the scheme is consistent with that of most other states which have a comparative fault rule. It has now become the accepted practice to include all tortfeasors in the apportionment question, although the practice is not unanimous. C.R. HEFT & C.J. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* § 8.131 (1978 Rev.) [hereinafter cited as HEFT & HEFT].

The Uniform Comparative Fault Act simply ignores nonparties. The commissioners' comment explains the rationale:

The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him. Both plaintiff and defendants will have significant incentive for joining available defendants who may be liable. The more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or defendant.

UNIFORM COMPARATIVE FAULT ACT § 2 Commissioners' Comment, 12 U.L.A. 39 (Supp. 1984). Such an explanation is inconsistent with the existing Indiana procedural scheme, in which a defendant has no right to join other liable parties and cannot seek contribution from them, whether or not they are parties. Indiana defendants can seek indemnity from the party truly at fault only when the party seeking indemnity is wholly without fault and subject only to vicarious liability.

³V. SCHWARTZ, *supra* note 2, at § 16.7. See, e.g., *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962); see also, *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). Indiana has recently reconsidered and rejected the adoption of the doctrine of contribution among tortfeasors, noting that the Indiana Comparative Fault Act expressly prohibits such rule. *Coca Cola Bottling Co. v. Vendo Co.*, 455 N.E.2d 370, 372 (Ind. Ct. App. 1983).

enforceable against the in-court defendant. That party is then left to his devices to collect contribution from his joint tortfeasors.

But in adopting the Indiana Act, a significant trade-off occurred, the merits of which will likely be debated at the bar for a long time to come. In the amelioration of the harshness of the contributory negligence defense, the doctrine of joint and several liability has been abolished by unequivocal inference of the Indiana Act.⁴ Since the doctrine is antithetical to the basic premise of the comparative fault concept—that liability for damage will be borne by those whose fault caused it in proportion to their respective fault—logic compelled its abolition.

The result is that the Indiana plaintiff may recover only that part of his damages actually caused by the in-court tortfeasor, and may or may not recover the remainder against the nonparty tortfeasor.⁵

Without the doctrine of joint and several liability, the plaintiff may not always be compensated for that portion of his damages attributable to certain kinds of tortfeasors, such as the insolvent tortfeasor, as addressed in the following section. This harsh result does not prevail in those jurisdictions where the doctrine of joint and several liability

⁴The inference arises out of the method of calculating the verdict, which holds a defendant liable only for his own percentage of fault. The statute states that "the jury next shall multiply the percentage of fault of each defendant by the amount of [total] damages . . . and shall enter a verdict against each such defendant . . . in the amount of the product of the multiplication of each defendant's percentage of fault times the amount of [total] damages" IND. CODE § 34-4-33-5(b)(4) (Supp. 1984).

However, it is possible that the plaintiff's bar may not concede that the doctrine of joint and several liability has been abolished by the Act.

I assume that Indiana, like most states, says that statutes enacted in derogation of common law are to be strictly construed. And, if that's the case, it seems to me that you on the plaintiff's side should be arguing to your Supreme Court that they must strictly construe this statute against the elimination of joint and several liability, and for the retention of joint and several liability, because that was the common law that existed prior to the adoption of comparative negligence. If you've got a statute that does not specifically spell out that we're eliminating joint and several liability, then it seems to me that you've got a good argument for the proposition that you have not lost it. Because, gentlemen, *if you've lost joint and several liability, that was too much to give up for what you got.*

Address by Donald W. Vasos, Esq., of Kansas City, Kansas, to the Indiana Trial Lawyers Association, September 16, 1983, Indianapolis, Indiana.

⁵IND. CODE § 34-4-33-5 (b)(4) (Supp. 1984). The Indiana Act specifies that in arriving at its verdict the jury shall first determine the percentage of fault of the claimant, each primary defendant, and of "any person who is a nonparty." *Id.* § 34-4-33-5 (b)(2). Then, if the fault of the plaintiff is not greater than fifty percent (50%) of the total fault, the jury shall determine the plaintiff's total damages. *Id.* § 34-4-33-5 (b)(3). Finally, it shall multiply the percentage of fault of each primary defendant by the total amount of the damages, and enter a verdict against each such defendant in the amount computed for that defendant. *Id.* § 34-4-33-5 (b)(4).

has been retained, along with comparative fault.⁶

III. CULPABLE NONPARTIES

In order to evaluate the soundness of that provision of the Indiana Act which permits the jury to apportion a percentage of causal fault to each nonparty whose conduct has contributed to plaintiff's injury, an identification of each type of nonparty is useful. With respect to certain types of culpable nonparties, the plaintiff has recovered, or will recover, damages. However, in some instances the plaintiff simply loses compensation to the extent of the nonparty's assigned percentage of fault. In other instances, some compensation may be realized from sources other than the civil action.

The sometimes competing objectives of simplicity and fairness must be balanced in providing for a practical scheme for litigation of losses. An attractive feature of the Indiana Act is its simplicity of application. All nonparties are subject to apportionment of fault. But since the Act does not provide any relief whatever to the plaintiff as to certain of those nonparties, an analysis of the nonparty provision of the Act by type of nonparty is appropriate in order to determine whether a *fair* system of loss adjustment has been adopted.⁷

A. *The Settling Tortfeasor*

The nonparty likely to be encountered by the jury most frequently

⁶Many states which have adopted a comparative fault scheme have also retained the doctrine of comparative contribution among tortfeasors. See, e.g., *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962), in which the rule of *comparative* contribution was first adopted. That the rule disregards the collectibility against the joint tortfeasor has been criticized as "a glaring example" of an "injustice." HEFT & HEFT, *supra* note 2, at § 1.350. Under this doctrine, any liable defendant may be called upon to pay the entire judgment. It is then up to that defendant to seek comparative contribution against the other tortfeasors, who may be either defendants, nonparties, or even a co-plaintiff. *Id.* A few states have required that the nonparty be joined as a defendant, at least for purposes of apportionment before his causal fault may be apportioned. See, e.g., *McCrary v. Taylor*, 579 S.W.2d 347 (Tex. Civ. App. 1979); see also, *Greenwood v. McDonaugh Power Equip.*, 437 F. Supp. 707 (D. Kan. 1977). These states go one critical step further than the Indiana Act in enhancing the plaintiff's likelihood of full recovery of his damages. However, Indiana and some other states place a lower priority upon enhancing plaintiff's opportunity for full recovery of his damages than upon retaining the concept of liability for damages in proportion to fault. For a discussion of the subject of contribution, see Annot., 53 A.L.R.3d 184 (1973).

⁷For purposes of such an evaluation, it is useful to the analysis to distinguish between those nonparties against whom the plaintiff has a *right* of recovery, and the nonparty against whom recovery is *allowed*. Some courts have made this distinction and have refused to permit the apportionment of fault to a person against whom the plaintiff has no right of recovery. See *Beach v. M & N Modern Hydraulic Press Co.*, 428 F. Supp. 956 (D. Kan. 1977); see also, *Greenwood v. McDonaugh Power Equip.*, 437 F. Supp. 707 (D. Kan. 1977). The Table below lists each of the enumerated categories and contains this distinction.

is that tortfeasor with whom plaintiff has reached a settlement before submission for decision.⁸ It does not matter to the defendants whether such a settlement has been consummated, or for how much, or even if the settling tortfeasor is excused from participating at trial, since the terms of such settlement are not determinative of the extent of any defendant's liability for damages. However, the defendant is vitally concerned about the percentage of fault to be assigned to the settling nonparty and will actively seek to shift as great a percentage as possible to the settling tortfeasor. Of course, such an attempt to shift fault will be resisted by the plaintiff.

TABLE		
Non-party	Right of Recovery	Recovery Allowed
1. Settled	yes	yes
2. Inadvertently omitted	yes	no
3. Intentionally omitted	yes	yes
4. Uninsured and insolvent	yes	no
5. Immune	no	no
6. Employer	no	yes*
7. Lack of Jurisdiction	yes	yes**

*A form of recovery is allowed under the Workmen's Compensation Act.
**Recovery may be possible in another jurisdiction, but perhaps by an inconsistent judgment.

It is readily seen from the Table that there are three categories of nonparties against whom a percentage of fault may be assessed, but against whom the plaintiff cannot realize any recovery, disregarding that tortfeasor whom the plaintiff has chosen not to sue. The most bothersome on philosophical grounds is the immune tortfeasor against whom the plaintiff lacks the right to recover and against whom recovery is not allowed. The plaintiff simply remains uncompensated for those damages attributable to the immune tortfeasor. Of equal importance, from the plaintiff's practical perspective, is the judgment-proof tortfeasor, although there may be other sources of recovery under certain circumstances. A resolution of the issue of whether it is appropriate to have a system of loss adjustment which denies to a plaintiff recovery of part of his damages requires an arrangement of priorities.

⁸Whether the adoption of comparative fault will encourage settlements is unknown. In the case in which the Supreme Court of Wisconsin adopted the rule of comparative contribution among joint tortfeasors, as contrasted with the existing rule of equal contribution, the effect of the change was predicted to increase settlements. The considerations may be similar to those which accompany the adoption of comparative fault.

Under the new rule, a defendant whose potential causal negligence is greater than 50% should be more willing to contribute a greater amount to a settlement than formerly. The defendant only slightly negligent should still settle for a sum in proportion to his fault in order to avoid the cost of litigation. In making settlements under the present rule, defendants generally contribute to the settlement in some rough proportion to what they think their negligence is, and if such proportion cannot be agreed upon under the inequities of the present rule, the settlement breaks down. The logic of conforming the rule of contribution

It may or may not matter to the settling tortfeasor what percentage of fault is assigned to him. Whether this matters will depend upon the terms of his settlement, either outright or contingent upon the jury's determination of his percentage of fault. It is expected that the use of loan receipt agreements⁹ will continue to flourish, although they will no longer be effective to shift liability for damages, as they were under the doctrine of joint and several liability.¹⁰

In both the former practice and under comparative fault, the plaintiff may select from among the several tortfeasors those with whom a favorable settlement is possible and those whom are to be sued. Under the former doctrine of joint and several liability, so long as the *faultless* plaintiff recovered a judgment against one solvent defendant, plaintiff's damages were recovered in full. The judgment would have been reduced only by the sums received in settlement from the other tortfeasors.

In contrast, full satisfaction may not always be achieved under the comparative fault scheme, even if all actors are collectible and amenable to suit. Depending upon the accuracy of plaintiff's forecast as to the amount of total damages to be awarded, and the percentage of causal fault assigned by the jury to the settling tortfeasor, the plaintiff may

to the practice of settlements is apparent. We recognize there is a difference of opinion among members of the bar concerning the effect of the proposed rule on settlements. Our own view is, substantially more settlements will result.

Bielski v. Schulze, 16 Wis. 2d 1, 12-13, 114 N.W.2d 105, 111 (1962). Nevertheless, the effect upon settlements in Indiana is difficult to predict. Where the transition is from the rule of contributory negligence to a system of comparative negligence, one must recognize that the pressure of the former "all or none" practice tended to promote settlements, while the Comparative Fault Act may offer the less harsh "half-loaf" result at trial. This might tend to make the trial outcome more palatable to both sides, and decrease the likelihood of settlements. On the other hand, the percentage of causal fault of a given tortfeasor may be more easy to predict in advance of trial than was the effect of the contributory negligence defense under the former practice. Thus, in some cases, settlement possibility may be enhanced.

⁹A loan receipt agreement is an agreement under which one joint tortfeasor lends funds to an injured plaintiff in exchange for the plaintiff's promise not to enforce a judgment against that tortfeasor. The loan will be repaid from the proceeds of a recovery from the other tortfeasor. *See, e.g., City of Bloomington v. Holt*, 172 Ind. App. 650, 361 N.E.2d 1211 (1977).

¹⁰The former Indiana practice, which included the doctrine of joint and several liability, encouraged the use of loan receipt agreements in effecting settlements. *Ohio Valley Gas v. Blackburn*, 445 N.E.2d 1378 (Ind. Ct. App. 1983); *Northern Indiana Public Service Co. v. Otis*, 145 Ind. App. 159, 250 N.E.2d 378 (1969). The threat of the employment of such agreements in multiple tortfeasor cases to place the burden of liability for all damages upon a single defendant tended to promote settlements. Under the Comparative Fault Act, such threat will not exist. However, it is noted that the use of such agreements, commonly known as "Mary Carter" agreements, have had widespread use in comparative negligence states. *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). *See Annot.*, 65 A.L.R.3d 602 (1975).

gain a windfall or suffer a penalty. For example, suppose that a jury were to find total damages of \$10,000, and apportioned 40% causal fault to the settling tortfeasor. If the plaintiff has effected a \$5,000 settlement from that person, the plaintiff will have realized a windfall of \$1,000. On the other hand, if the jury were to find damages of more than \$12,000, or assign more than 50% causal fault to that tortfeasor, the plaintiff would have suffered a penalty for his incorrect assessment of his prospects at trial.

This windfall/penalty settlement rule of Indiana seems to satisfy the "fairness" objective better than a rule that allows neither a windfall nor a penalty.¹¹ The latter rule results in the non-settling defendant bearing a greater burden of the damages than his apportioned fault would otherwise require, where the settling defendant has settled for a sum less than that for which he would have been liable under the jury's assessment. While the encouragement of settlements is a laudable goal, courts should be most reluctant to adopt a rule which penalizes any party, either plaintiff or defendant, from exercising the right to have his day in court and to have his conduct judged by his peers.

In judging the fairness of Indiana's new system, it seems not to matter that where the plaintiff realizes a windfall by a settlement, the plaintiff actually recovers *more than his adjudicated damages*. Theoretically, this result could never have occurred under the traditional tort system since the settlement sum was admissible under the accord and satisfaction defense, it being said that "a plaintiff is entitled to only one recovery for a wrong."¹² However, the realist of the trial bar understands that the traditional system has not worked with such perfection as to insure the absolutely just result. The maximization of compensation to an injured plaintiff is the goal of the plaintiff's bar, and the windfall/penalty rule presents an acceptable risk voluntarily undertaken by both sides to the settlement. One should conclude that it is both fair and logical to apportion a percentage of fault to the nonparty who has settled, and that neither the amount of such settlement, nor the fact that there was a settlement, is of concern to the jury.¹³

¹¹Not all jurisdictions have accepted the windfall/penalty rule of settlements. In California, there can be neither a penalty nor a windfall. The plaintiff's recovery is diminished only by the *amount* that plaintiff has actually received in a good-faith settlement, rather than an amount determined by the settling tortfeasor's apportioned fault. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 604, 578 P.2d 899, 916, 146 Cal. Rptr. 182, 199 (1978). Conversely, the total recovery from all tortfeasors cannot exceed the amount of damages determined by the jury. In *Jaramillo v. State*, 81 Cal. App. 3d 968, 146 Cal. Rptr. 823 (1978), the plaintiff was not allowed to recover by a combination of settlement and suit a sum greater than the damages which the jury had determined to be due him. *Id.* at 970, 146 Cal. Rptr. at 825. The court reasoned that such a rule would encourage settlements. *Id.*

¹²*Barker v. Cole*, 396 N.E.2d 964, 970 (Ind. Ct. App. 1979).

¹³However, Professor Davis argues that "the jury might as well be told all the facts

B. *The Inadvertently Omitted Tortfeasor*

The nonparty tortfeasor against whom the applicable period of limitations has expired presents the same consideration in a comparative negligence context as under the traditional tort system. The social purpose of statutes of limitations was confirmed by the Indiana Supreme Court long ago:

Statutes of limitations are now generally looked upon as statutes of repose. They rest upon sound policy, and tend to the peace and welfare of society, and they are to be deemed just as essential to the general welfare and wholesome administration of justice as statutes upon any other subject.¹⁴

That a citizen may, with the passage of a specified period of time, enjoy the comfort of knowing that he can no longer be sued as an accused tortfeasor is a social purpose equally viable under both the comparative fault system and under the traditional tort system. In both contexts, the plaintiff must exercise diligence in identifying all the actors at fault in the incident and proceed seasonably. However, this diligence is even more important in the multiple tortfeasor cases under the comparative fault system. Under the traditional tort approach, including the doctrine of joint and several liability, the plaintiff was assured of recovery of his verdict sum if he proceeded seasonably against any one tortfeasor. Now he must proceed against all, or have his recovery diminished accordingly.

Although this may appear to be a harsh result, a defendant should not be penalized for a plaintiff's lack of diligence in identifying and suing each tortfeasor. If diligence is to be encouraged, so as to achieve true apportionment and liability according to fault, the burden of loss must fall on that party who determines who shall be defendants in the suit. The Indiana Act preserves the appropriate incentive for the plaintiff to exercise diligence.

C. *The Intentionally Omitted Tortfeasor*

Among the reasons offered by one writer for the intentional omission of a tortfeasor from suit are "whim, spite, collusion, or any possible tactical or personal consideration."¹⁵ As an example, the injured plaintiff

of a settlement short of the actual figures." Davis, *Comparative Negligence, Comparative Contribution, and Equal Protection in the Trial and Settlement of Multiple Defendant Product Cases*, 10 IND. L. REV. 831, 870 (1977). The author seems to be preoccupied with speculative conclusions about the jury's perception of why the case does not proceed against certain obviously culpable parties and with the court's role in presiding over settlements. It seems to make no more sense to identify for the jury tortfeasors who have settled than to identify uninsured tortfeasors.

¹⁴High v. Board of Commissioners, 92 Ind. 580, 589-90 (1883).

¹⁵Goldenberg & Nicholas, *supra* note 1, at 45.

would likely be reluctant to sue another family member, especially where the two were members of the same economic unit, insurance considerations aside.¹⁶ Under the former Indiana practice, where each defendant in a tort action was jointly liable for all the damages to the faultless plaintiff, such a selective decision placed an obviously unfair burden upon the remaining tortfeasors.

Under the Comparative Fault Act, the plaintiff now will have a price to place on such a decision to favor one tortfeasor over another. If suit is withheld against a favored tortfeasor, the plaintiff's recovery is diminished accordingly. The process of balancing a plaintiff's social considerations with his economic considerations will dictate his choice of defendants, and will preserve the true goal of the comparative fault system of assessing liability in proportion to fault.

D. The Judgment-Proof Tortfeasor

Under the Indiana comparative fault plan, the plaintiff bears the entire burden of the fault apportioned to the uninsured and insolvent tortfeasor. This is so whether that tortfeasor is a party or a nonparty. Under the former practice, the solvent or insured defendant bore this burden. Neither result is fair.

Oklahoma has adopted a system of comparative negligence which, like Indiana, includes nonparty tortfeasors in the apportionment scheme, but does not recognize joint and several liability.¹⁷ In dealing with the insolvent tortfeasor, the Oklahoma Supreme Court showed little concern for the plaintiff's inability to collect a portion of his damages:

It is argued that this could work a hardship on a plaintiff if one co-defendant is insolvent. But the specter of the judgment-proof wrongdoer is always with us, whether there is one defendant or many. We decline to turn a policy decision upon an apparition. There is no solution that would not work an inequity on either the plaintiff or a defendant in some conceivable situation where one wrongdoer is insolvent.¹⁸

As in Indiana, Oklahoma assigns a higher priority to adherence to the

¹⁶One might suspect that the plaintiff's failure to include his son as a party defendant in *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978), was the result of such a "personal consideration." See *supra* note 2.

¹⁷OKLA. STAT. ANN. tit. 23, §§ 11-14 (West, Supp. 1984). Two features in the Oklahoma common law, the inclusion of nonparty tortfeasors in the apportionment scheme and the abolition of joint and several liability, arose in the construction of the comparative negligence statute of that state. *Paul v. N. L. Industries*, 624 P.2d 68 (Okla. 1980); *Laubach v. Morgan*, 588 P.2d 1071 (Okla. 1978). The Act itself is silent as to such features. Similarly, the Supreme Court of Kansas abolished the doctrine of joint and several liability in construing that state's act. *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978).

¹⁸*Laubach v. Morgan*, 588 P.2d 1071, 1075 (Okla. 1978).

principle of liability for damages in proportion to fault than to the maximization of recovery by the plaintiff.¹⁹

It is some consolation that in auto injury cases, the injured plaintiff may be afforded limited protection by the mandatory insurance law and by his own uninsured and underinsured motorists coverage. In injuries arising out of other kinds of casualties, the injured party is protected to some extent by his voluntary health and accident insurance and disability insurance programs, although frequently the cost of medical care is only a relatively small part of the total loss from a bodily injury. Such collateral sources of funds are of greater importance in the absence of joint and several liability under the comparative fault scheme.

¹⁹In California, a different hierarchy of interests has been adopted, the order being: "first is maximization of recovery to the injured party, the second is the encouragement of settlement of the injured party's claim and the third is equitable apportionment of liability among tortfeasors." *Teacher's Ins. Co. v. Smith*, 128 Cal. App. 3d 862, 865, 180 Cal. Rptr. 701, 703 (1982). Predictably, the doctrine of joint and several liability has been retained in that state. *Id.*

The drafters of the Uniform Comparative Fault Act were so concerned about the inability of the plaintiff to collect his damages from a judgment debtor that they provided a very cumbersome system of "reallocation." UNIF. COMPARATIVE FAULT ACT § 2, 12 U.L.A. 39 (Supp. 1984). Section 2(d) provides:

Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

The commissioners' comment argues the justification for the scheme of reallocation:

Reallocation. Reallocation of the equitable share of the obligation of a party takes place when his share is uncollectible.

Reallocation takes place among all parties at fault. This includes a claimant who is contributorily at fault. It avoids the unfairness both of the common law rule of joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint-and-several liability, which would cast the total risk of uncollectibility upon the claimant.

UNIF. COMPARATIVE FAULT ACT § 2, Commissioners' Comment, 12 U.L.A. 40 (Supp. 1984). Such a procedure must fail when judged by the standard of simplicity of application, and by the need of the practicing attorney and the casualty insurance industry for finality of judgment.

One writer suggests that the best solution is to distribute the burden of insolvency between the solvent tortfeasor or tortfeasors and the plaintiff, according to their respective degrees of fault. Goldenberg & Nicholas, *supra* note 1, at 53. While serving the objective of full compensation to injured plaintiffs, such a solution admittedly compromises the goal of liability in proportion to fault. No jurisdiction has adopted such a rule.

However, Indiana and some other states place a lower priority upon enhancing plaintiff's opportunity for full recovery of his damages than upon retaining the concept of liability for damages proportionately to fault. For a discussion of the subject of contribution, see Annot., 53 A.L.R. 3d 184 (1973).

Notwithstanding such collateral sources in some cases, there is no provision for the plaintiff's recovery of damages caused through the fault of an uninsured tortfeasor in a substantial portion of injury litigation. Further, no solution is possible under the system of loss apportionment which is founded upon the principal of liability in proportion to fault.

Most states have avoided the problem of the insolvent tortfeasor by holding that the comparative negligence statute does not change the common law rule that every joint tortfeasor who is liable at all is liable for the total damages the plaintiff is entitled to recover.²⁰ Whether the Indiana Act, which leaves some losses uncompensated, is fair depends upon the priorities one assigns to the objectives of true loss apportionment according to fault relative to that maximization of recovery by the injured party. Indiana's new Act favors the former over the latter.²¹

E. The Unavailable Tortfeasor Beyond Jurisdiction

There will be instances in which a nonparty tortfeasor is not available for suit, either because he is not amenable to process or because of some jurisdictional prohibition. That the plaintiff may be required to pursue the liable parties in two separate actions is not peculiar to the comparative fault system, as this problem existed under the former practice. However, with the rule of joint and several liability, it was necessary only for the plaintiff to prosecute one action to a favorable judgment in order to recover all of his damages. In contrast, under the comparative fault system adopted by Indiana in which there is no joint and several liability, the plaintiff is required to pursue each tortfeasor to judgment in order to realize full recovery. Thus, the plaintiff bears the risk of inconsistent results between judgments,²² since the second jury may assign different percentages than the jury in the first trial.

²⁰HEFT & HEFT, SUPRA note 2 at appendix II. For a discussion by the Appellate Court of Illinois of the rationale for the retention of the doctrine of joint and several liability in the comparative negligence scheme, see *Conney v. J.L.G. Indus.*, 97 Ill. 2d 104, 454 N.E.2d 197 (1983).

²¹See *supra* note 19 and accompanying text.

²²This is, in the first trial against defendant *A*, the jury may apportion a given percentage of causal fault to *B*, a nonparty. Of course, *B* would not be bound by such determination in a later trial against *B*. In the trial against *B*, where *B* is permitted to litigate his liability anew, the result of the trial against *A* should not be admissible. In *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 523 P.2d 1226, 119 Cal. Rptr. 858 (1975), the California Supreme Court recognized that

[o]ne such problem may arise when all responsible parties are not brought before the court: it may be difficult for the jury to evaluate relative negligence in such circumstances, and to compound this difficulty such an evaluation would not be *res judicata* in a subsequent suit against the absent wrongdoer.

Id. at 823, 523 P.2d at 1240, 119 Cal Rptr. at 872.

The results include the possibility that the plaintiff will not recover all of the damages allocated by either jury to the tortfeasors, or that he may recover more total damages than to which either jury found him entitled. Of course, the ultimate inconsistency would be where the plaintiff's recovery in the first suit is diminished by an apportionment of fault to the nonparty, and in the second suit against the same alleged tortfeasor the jury finds for the defendant.

One writer observes that these inconsistencies ought not discourage the uniform application of the comparative fault doctrine: "It would be unfortunate to permit the fear of occasional inconsistencies in loss distribution to prevent the adoption of a system of spreading loss which would in most cases abolish the archaisms of our present common law rules of negligence."²³

IV. TORTFEASORS WHO CANNOT BE NONPARTIES

A. *The Immune Tortfeasor*

The Indiana Act, as originally enacted, carried the apportionment scheme further toward the objective of liability in proportion to fault than the statutes of any other state and further than even the common law had permitted in most states, as shown by the Act's total disregard of the injured plaintiff's inability to collect his damages from a nonparty. The immune tortfeasor was included in the allocation of fault, and was the only type of nonparty tortfeasor against whom the plaintiff had no *right* of recovery.²⁴ To the extent that such an immune person contributed to cause injuries to the plaintiff, those injuries were to remain uncompensated. This inequity was eliminated by the 1984 amendment,²⁵ which required that "nonparties" need be of a class which are, or may be, liable.²⁶ Some states are like Indiana and have provided that all the parties shall share the burden of the immune tortfeasor in proportion to their respective fault by ignoring those against whom recovery is not allowed.²⁷

²³Goldenberg & Nicholas, *supra* note 1, at 52-53 (quoting GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 118 (1936)).

²⁴A distinction is made here between the tortfeasor who enjoys a traditional immunity, such as sovereign immunity, and the so-called "immune" employer, as to whom the Workmen's Compensation Act provides an exclusive remedy. See IND. CODE §§ 22-3-1-1 to -10-3 (1982).

²⁵IND. CODE § 34-4-33-2(a) (Supp. 1984).

²⁶*Id.*

²⁷KAN. STAT. ANN. § 60-258a(d) (1976) speaks of "all parties against whom such recovery is allowed." For a reconciliation of such language with the holding in *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978), see Comment, *Brown and Miles: At Last, and End to Ambiguity in the Kansas Law of Comparative Negligence*, 27 U. KANS. L. REV. 111 (1978).

Other states, in a similar effort to alleviate this hardship, have also sacrificed the fundamental principle of liability in proportion to fault by adopting various methods to assist the plaintiff in realizing a recovery of damages. Where the doctrine of joint and several liability has been retained, the liable defendant bears the entire burden of the culpable, but immune, tortfeasor. Yet others adhere to the basic principle that no defendant is liable for a greater share of the damages than his proportionate share of the fault, and permit an apportionment of fault to the immune nonparty.²⁸

There has been some noticeable withering of the various immunities in Indiana.²⁹ However, some vestiges remain, the most prominent being that form of governmental immunity which is provided in the Indiana Tort Claims Act.³⁰ It is apparent that the immunity for certain acts of governmental officials would have resulted in the denial of recovery for a significant portion of damages of injured plaintiffs had immune tortfeasors been retained in the scheme. It seems appropriate that the legislature examined the original Act, sacrificed the fundamental principle of liability for damages according to fault, and removed immune tortfeasors from the fault apportionment scheme.

B. The Employer

In the industrial injury action, the fault of the employer is often prominent. A typical scenario involves an injury to the operator of a machine, such as a power press. In such a case, the injury may be caused in part by the employer's negligence in the alteration or maladjustment of a point-of-operation safety device, and in part by a manufacturing or design defect. The employer is insulated from all civil liability by the applicable worker's compensation act.³¹ The injured employee typically exercises his legal remedy solely against the machine's manufacturer, who shoulders the burden of both his fault and that of the employer. Under Indiana law, there is no contribution among joint tortfeasors.³² Nor is there a right of indemnity or contribution by the culpable manufacturer against such employer.³³

In the scenario posed, the employer would pay statutory worker's compensation benefits, for which it would then have a lien on the

²⁸See *Connar v. West Shore Equip.*, 68 Wis. 2d 42, 227 N.W.2d 660 (1975).

²⁹Interspousal tort immunity has been abolished in Indiana. *Brooks v. Robinson*, 259 Ind. 16, 284 N.E.2d 794 (1972). The parent-child immunity is still intact. *Vaughn v. Vaughn*, 161 Ind. App. 497, 316 N.E.2d 455 (1974).

³⁰IND. CODE § 34-4-16.5-1 to -16.5-19 (1982).

³¹See IND. CODE § 22-3-2-6 (1982).

³²*Barker v. Cole*, 396 N.E.2d 964 (Ind. Ct. App. 1979).

³³*McClish v. Niagara Mach. & Tool Works*, 266 F. Supp. 987 (S.D. Ind. 1967).

recovery against the manufacturer to the extent of benefits paid.³⁴ The employer's fault, even if gross misconduct, is irrelevant to his absolute right to satisfaction of his lien.³⁵

Under the original Indiana Comparative Fault Act, it was clear that the employer is a type of nonparty whose fault must be apportioned by the jury.³⁶ Yet, there was no statutory provision requiring the employer to contribute to plaintiff's damages, even though the employer's fault was to be affirmatively apportioned and the employer was to be named on the verdict form. Moreover, the apportionment of fault to the employer did not serve to reduce the amount of the employer's lien for compensation benefits paid. Because the doctrine of joint and several liability is abolished, the statutory obligation to pay the employer's lien from the "partial" recovery against the manufacturer would have left the plaintiff entirely uncompensated from *either* source for a portion of his damages. This injustice cried out for remedial legislation to modify the lien recovery rights of the employer who is at fault.³⁷

The basic compromise in the adoption of the Workmen's Compensation Act was that the employer was made liable without fault for benefits to the injured employee, irrespective of the contributory fault

³⁴IND. CODE § 22-3-2-13 (1982).

³⁵*Blade v. Anaconda Aluminum Co.*, 452 N.E.2d 1036 (Ind. Ct. App. 1983).

³⁶The original Act was amended significantly by the express exclusion of the employer from the apportionment of causal fault. Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2, 1984 Ind. Acts 1468, 1468-69 (amending Act. of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 2). Other states permit the inclusion of the employer in the apportionment scheme. See *Connar v. West Shore Equip.* 68 Wis. 2d 42, 227 N.W.2d 660 (1975); see also, *Pocatello Indus. Park Co. v. Steel West, Inc.*, 101 Idaho 783, 621 P.2d 399 (1980).

³⁷The problem is addressed in commissioners' comments to Section 6 of the Uniform Comparative Fault Act:

Worker's compensation. An injured employee who has received or is entitled to worker's compensation benefits from his employer may ordinarily bring a tort action against a third party, such as the manufacturer of the machine that injured him, and recover for his injury in full. Under the rule in most states, the defendant is not entitled to contribution from the employer, even though the employer was negligent in maintaining the machine or instructing the employee in its use. This casting of the whole loss on the tort defendant may be unfair and greatly in need of legislative adjustment. It is so affected by the policies underlying the worker's compensation systems, however, and these policies vary so substantially in the several states that it was felt inappropriate to include a section on the problem in a uniform act.

Several solutions are possible. Thus, the contribution against the employer may be provided for. Or the recovery by the employee may be reduced by the proportionate share of the employer. Or the amount of that proportionate share may be divided evenly between the employer and employee, so that the compensation system bears responsibility for it. Provision also needs to be made for the relation of the tort defendant to the compensation benefits. In any event, contributory negligence on the part of the employee will come within the scope of this Act and will affect the amount of recovery.

UNIF. COMPARATIVE FAULT ACT § 6 Commissioners' Comments 12 U.L.A. 45 (Supp. 1984).

of the employee. But, such liability is limited to statutory benefits.³⁸ These benefits are usually less than the damages which the faultless employee could have recovered in a civil suit. In consideration of the employee's absolute right to compensation from the employer, it is fair that the employee's compensation attributable to the employer's fault be less than that which the employee might recover in the more generous civil forum. But to have deprived the injured employee of all compensation for that portion of his damages attributable to the employer's fault defies both logic and equity.

The California courts, which created that state's comparative fault scheme without the assistance of its legislative body, have adopted a rule which permits the employee to regain his worker's compensation benefits under these circumstances. The rule allows the employer to recover for compensation benefits *only* to the extent that those benefits exceed the share of damages proportionate to the employer's negligence.³⁹ The adoption of such a rule by an amendment of the Indiana Workmen's Compensation Act would have been absolutely essential to a fair system of loss distribution, and would not have violated any equitable principle inherent in the worker's compensation system. Instead, the legislative succumbed to the easy remedy, and simply removed the employer from the definition of "nonparty."

It should be noted that not all courts have permitted the inclusion of the employer in the apportionment process. A federal court in applying the Kansas law held that since the plaintiff had no *right* to recover against his employer, the fault of the employer must be ignored. The court observed: "The liability [for worker's compensation benefits] is in no sense founded upon tort, but is based upon the contract of employment and the statute, the terms of which are embodied in the contract."⁴⁰ Conversely, Wisconsin courts have permitted the employer's negligence to be considered.⁴¹ Since the employer at common law was liable for negligent injury to his employee, the standard by which the employer's conduct is to be judged is well established. Thus, the argument against inclusion of the employer in the apportionment scheme is not persuasive. However, both logic and fairness suggest that the negligent

One federal court believes it appropriate for courts to fashion a remedy to prevent such inequity. *Barron v. United States*, 473 F. Supp. 1077, 1088-89 (D. Hawaii 1979).

³⁸See, Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 469 (1953).

³⁹*Arbaugh v. Proctor & Gamble Mfg. Co.*, 80 Cal. App. 3d 500, 145 Cal. Rptr. 608 (1978). In *Rodriguez v. McDonnell Douglas Corp.*, 87 Cal. App. 3d 626, 151 Cal. Rptr. 399 (1979), the employer's negligence was 10%, and 10% of the total damages exceeded the amount of the benefits paid. The employer was held entitled to no reimbursement. *Id.* at 670, 151 Cal. Rptr. at 424.

⁴⁰*Beach v. M & N Modern Hydraulic Press Co.*, 428 F. Supp. 956, 960 (D. Kan. 1977) (quoting *Houk v. Arrow Drilling Co.*, 201 Kan. 81, 439 P.2d 146 (1968)). *But see* *LeMaster V. Amstead Indus.*, 110 Ill. App. 3d 729, 734, 442 N.E.2d 1367, 1371 (1982), (where the employer is easily characterized as a "tortfeasor" for purposes of indemnity).

employer's right to recover his compensation lien should be diminished in proportion to his fault, as under the California rule.

V. THE "NAME" REQUIREMENT

The Indiana Act pursues the objective that the blameworthiness of all actors should be considered by the inclusion of nonparties in the apportionment question. However, its effort is diminished by the provision that, in order for the trier of fact to apportion negligence to a nonparty, it must state on its verdict form the actual *name* of each nonparty to whom fault is assigned.⁴² The drafters of the Indiana Act chose not to permit the defendant to prove the causal faults of such nonparties as "the unknown driver of the red car."⁴³

Upon first analysis, one is tempted to explain the provision by a plaintiff-bias on the part of suspicious drafters, who anticipated that defendants will conjure up true phantoms.⁴⁴ On further consideration, it seems fair that if the defendant seeks to diminish his own contribution to damages by the proof of fault of the nonparty, the defendant should "offer" the nonparty by name for joinder by plaintiff. The drafters of the Indiana Act were left to reconcile two competing considerations. The first was the achievement of full comparative recovery for the plaintiff by ignoring existing but unidentifiable tortfeasors. However, the drafter also had to consider a philosophy which emphasized a true apportionment of damages among *all* tortfeasors in proportion to their fault, irrespective of their amenability to suit and their solvency.

The Indiana Act is mildly tarnished by the sacrifice of the latter, more idealistic, goal in favor of maximizing recovery by the injured plaintiff when the nonparty cannot be identified. This seems to be the most blatant instance in the Act of a shifting of priorities.

⁴¹Connar v. West Short Equip., 68 Wis. 2d 42, 227 N.W.2d 660 (1975).

⁴²This requirement is clearly expressed in the Act:

The court shall furnish to the jury forms of verdict that require the disclosure of:

(1) the percentage of fault charged against each party;

(2) the calculations made by the jury to arrive at their final verdict.

If the evidence in the action is sufficient to support the charging of fault to a nonparty, the form of verdict also shall require a disclosure of the name of the non-party and the percentage of fault charged to the nonparty.

IND. CODE § 34-4-33-6 (Supp. 1983).

⁴³See Jacobs v. Milwaukee & Suburban Transport Corp., 41 Wis. 2d 661, 663, 165 N.W.2d 162, 163 (1969). Wherein a suit by a passenger against the defendant bus company for injuries sustained in a fall as the bus lurched, the jury apportioned 12% of the causal negligence to the bus driver, 19% to plaintiff, and 69% to "the unknown driver of the red car."

⁴⁴The term "phantom" is commonly used to describe any kind of involved nonparty, whether or not they are identifiable. See HEFT & HEFT, *supra* note 2, at appendix II; see also, Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449, 453-54 (10th Cir. 1982).

VI. PLEADING, AMENDMENT, AND DISCOVERY

The Indiana Comparative Fault Act, as originally drafted, did not expressly assign the burden of pleading or proving the fault of the nonparty. Further, it did not limit the time during which the pleadings could be amended to include the fault of the nonparty in the assignment of fault by the trier of fact.

Fairness, but perhaps not idealism, dictates that the objective of apportionment of damages among all tortfeasors in proportion to their fault must yield to the need for full disclosure of defenses and the *timely* identification of all culpable persons. Thus, the 1984 legislature amended the Act by including a provision which deals with pleading and proof, as well as with the timeliness of disclosure of the nonparty defense. The Act provides that the pleading and proof of the "nonparty defense" is on the defendant,⁴⁵ and also provides a specific timetable for the assertion of such a defense.⁴⁶ The plaintiff is well advised to file the suit more than the specified 150 days before the expiration of the applicable period of limitations in order to allow sufficient time to join as defendants other parties whose culpability may be asserted by the defendant. However, it must be remembered that newly joined defendants also have the right to assert the defense of the fault of other nonparties. This defense may be asserted after the limitation period has expired. Thus, merely filing suit more than 150 days before the expiration of the period of limitations will not assure a plaintiff of full protection against the unavailability of tortfeasors whose fault will serve to diminish plaintiff's damages.

The adoption of the provision for pleading and proof of the nonparty defense was necessary for the achievement of full recovery by a plaintiff of all damages found against all available tortfeasors. Similarly, the

⁴⁵IND. CODE § 34-4-33-10(b) (Supp. 1984).

⁴⁶A nonparty defense that is known by the defendant when he filed his first answer shall be pleaded as a parat of the first answer. A defendant who gains actual knowledge of a nonparty defense after the filing of an answer may plead the defense with reasonable promptness. However, if the defendant was served with a complaint and summons more than one hundred fifty (150) days before the expiration of the limitation of action applicable to the claimant's claim against the nonparty, the defendant shall plead any nonparty defense not later than forty-five (45) days before the expiration of that limitation of action. The trial court may alter these time limitations or make other suitable time limitations in any manner that is consistent with:

- (1) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense; and
- (2) giving the claimant a reasonable opportunity to add the nonparty as an additional defendant to the action before the expiration of the period of limitation applicable to the claim.

IND. CODE § 34-4-33-10(c) (Supp. 1984).

requirement of pleading the defense serves to limit precisely the jury's role in the selection of persons against whom fault may be assigned. For example, suppose that no party advances at trial, by appropriate pleading or argument, the position that the fault of a certain nonparty was a proximate cause of plaintiff's injury. The often-heard instruction to the jury charges that while the jury must accept the instructions of law as given by the court, the jury is the exclusive judge of the facts. May the jury then in the exercise of conscientious whim determine that John Doe, about whose *conduct* it heard evidence, but whose causal fault was not pleaded, was also guilty of causal fault and apportion such fault to John Doe in its verdict? The compelling answer must be negative and the jury must be so instructed as a precaution, perhaps to avoid a mistrial. While there may be several reasons to support such a conclusion, the most obvious is that the jury will not have been instructed as to the legal duty of John Doe to the plaintiff. For example, assume that a plaintiff was injured as an automobile passenger of John Doe in a head-on collision with the auto of defendant, and the evidence is clear that the combined *negligence* of Doe and the defendant caused the collision. If plaintiff were a *guest* passenger of Doe, there may not be a recovery from him in the absence of his wanton or willful misconduct, of which Doe was not guilty. If the fault of John Doe were pleaded by the defendant, then the jury would be instructed that fault may be assigned to Doe *only* if he had acted with wanton or willful misconduct. If the defendant does not plead the fault of Doe, the jury should be instructed, as a precaution, that causal fault may be apportioned only among the parties at trial. To fail to so advise the jury would be to invite a mistrial.

VII. CONCLUSION

An eminent author and respected federal jurist, Henry Woods, observed that the "attractiveness of comparative fault is its simplicity," although he noted that it works best in a "pure" comparative jurisdiction.⁴⁷ To be sure, the Indiana Act will avoid the agonies experienced in other jurisdictions in addressing, seemingly without end, such questions as whether the traditional products liability theories are to be included, how contribution among tortfeasors is to be implemented, and whose fault is to be compared. The drafters of the Indiana Act viewed the accounts of those litigation struggles in other states and wrote the best solutions into the Act. Thus, Indiana has a headstart in the development of its corpus of common law in the comparative fault field. However,

⁴⁷H. Woods, *Products Liability: Is Comparative Fault Winning the Day?*, 36 ARK. L. REV. 360, 382 (1982).

it is naive to describe the comparative fault Act of Indiana in terms of "simplicity." There will be growing pains. In providing for sound and orderly growth, the courts and the trial bar must always weigh the utility of the basic premise of the comparative fault concept that "fairness dictates that the blameworthiness of all actors in an incident be treated on a consistent basis."⁴⁸

⁴⁸Adler, *Allocation of Responsibility After American Motorcycle Association v. Superior Court*, 6 PEPPERDINE L. REV. 1, 15 (1978) *quoted in*, *Bartlett v. New Mexico Welding Supply*, 98 N.M. 152, 158, 646 P.2d 579, 585 (1982).

The Impact of Comparative Fault in Indiana

ROGER L. PARDIECK*

I. INTRODUCTION

Indiana has long adhered to the rule that a contributorily negligent plaintiff is not entitled to recover any damages in tort actions.¹ This "all or nothing approach" will be altered in 1985 when Indiana's Comparative Fault Act takes effect.² In most states, the elimination of the "all or nothing" rule of common law contributory negligence is the major impact of a comparative fault law. However, this change may not be the most significant alteration. The cumulative effect of a nonparty defense,³ the possible elimination of joint and several liability,⁴ and legislative restrictions on fault comparison⁵ may overshadow the elimination of the "all or nothing" approach.

*Partner with the firm of Montgomery, Elsner & Pardieck. A.B., Indiana University, 1959; LL.B., Indiana University—Bloomington, 1963. The author wishes to extend his appreciation to Sharon L. Hulbert for assistance in the preparation of this Article.

¹See, e.g., *Hundt v. La Crosse Grain Co., Inc.*, 446 N.E.2d 327 (Ind. 1983); *Kingan & Co. v. Gleason*, 55 Ind. App. 684, 101 N.E. 1027 (1913); *Hall v. Terre Haute Elec. Co.*, 38 Ind. App. 43, 76 N.E. 334 (1905).

²Act of Apr. 21, 1983, Pub. L. No. 317-1983, 1983 Ind. Acts 1930 (codified as amended at IND. CODE §§ 34-4-33-1 to -13 (Supp. 1984) (effective Jan. 1, 1985) [hereinafter 1983 Act]. Indiana became the 40th state to adopt some form of comparative fault when S.B. 287 was passed. Bayliff, *Comparative Fault Act*, VERDICT 13-15 (post leg. ed. 1983).

³See Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 5, § 10, 1984 Ind. Acts 1468, 1471-72 (codified at IND. CODE § 34-4-33-10 (Supp. 1984)).

⁴While the statute does not expressly eliminate joint and several liability, it can be interpreted as abolishing joint and several liability. See *infra* notes 51-84 and accompanying text. See also Wilkins, *The Indiana Comparative Fault Act At First (Lingering) Glance*, 17 IND. L. REV. 687, 718 (1984).

⁵The Indiana Act not only creates comparative fault but also creates a number of restrictions to its application. First, comparative fault will apply and allow recovery only when the claimant's fault is less than "the fault of all persons whose fault proximately contributed to the claimant's damages." IND. CODE § 34-4-33-4(a), (b) (Supp. 1984)). Second, the Act also bars the claimant's recovery if the claimant's fault is "greater than fifty percent (50%) of the total fault." *Id.* § 34-4-33-5(a)(2) and (b)(2).

In addition to limiting the claimant's recovery under certain circumstances, the Act sets forth certain types of actions that will not be covered by comparative fault. The definition of fault states that actions based on intentional conduct do not fall under the scope of the Act. *Id.* § 34-4-33-2(a) (Supp. 1984). The Act also does not apply to any strict liability actions brought under the Products Liability Act. *Id.* § 34-4-33-13. For an interesting discussion regarding the benefits and detriments of this exclusion on manufacturers, see Fisher, *Products Liability & Overview of Act*, in *Indiana's Comparative Fault Act* VI-1, VI-22 (Indiana Continuing Legal Education Forum 1984). Finally, Indiana Code section 34-4-33-8 states that comparative fault "does not apply in any manner to tort claims against governmental entities or public employees under I.C. 34-4-16.5." The expansiveness of the governmental exclusion is understood only when the definitions of public employee and governmental entity are examined.

Indiana Code section 34-4-16.5-2(1) defines public employee:

"[E]mployee" and "public employee" means a person presently or formerly acting on behalf of a governmental entity whether temporarily or permanently or with or without compensation, including members of boards, committees, commissions, authorities and other instrumentalities of governmental entities, and elected public officials, but does not include an independent contractor or an agent or employee of an independent contractor.

Indiana Code section 34-4-16.5-2 states that

(2) "governmental entity" means the state or a political subdivision of the state;

* * *

(5) "political subdivision" means a:

- (i) county,
- (ii) township,
- (iii) city,
- (iv) town,
- (v) separate municipal corporation,
- (vi) special taxing district,
- (vii) state college or university,
- (viii) city or county hospital,
- (ix) school corporation, or
- (x) board or commission of one (1) of the entities listed in clauses (i) through (ix), inclusive of this subdivision;

(6) "state" means Indiana and its state agencies; and

(7) "state agency" means a board, commission, department, division, governmental subdivision including a soil and water conservation district, bureau, committee, authority, military body, or other instrumentality of the state, but does not include a political subdivision.

IND. CODE § 34-4-16.5-2(2) & (5) to (7) (1982). For discussions of this exemption, see Fisher, *supra*, at VI-19 and Wilkins, *supra* note 4, at 692.

It is also questionable whether comparative fault will apply to actions involving a guest statute. Some jurisdictions have entertained the idea that comparative fault impliedly repeals automobile guest statutes. *Davis v. Cox*, 593 S.W.2d 180 (Ark. 1980); *Huydts v. Dixon*, 606 P.2d 1303 (Colo. 1980). In *Davis v. Cox*, the court first declared the guest statute constitutional and then determined that the guest statute was not repealed by the passage of the comparative fault statute. The court noted that for one statute to repeal another, the implication had to be "clear, necessary and irresistible." 593 S.W.2d at 183. The court acknowledged that the guest statute may entirely eliminate a cause of action but stated that the concept of comparative fault and the guest statute's elimination of a cause of action were compatible. Therefore the guest statute was not deemed repealed.

The *Huydts* decision addressed the argument that an implied repeal of assumption of risk by adoption of comparative fault was the same as an implied repeal of the guest statute. The court rejected this argument stating that unlike assumption of risk, the guest statute was "not derived from the common law doctrine of contributory negligence; but stems from a legislative decision that one who rides as a guest in another person's vehicle should not be allowed to recover for injuries caused by the operator's simple and ordinary negligence." 606 P.2d at 1306. The court's argument that the issue was one for the legislature was strengthened by the fact that the legislature had expressly repealed the guest statute five years after the adoption of the comparative fault statute. However, because the guest statute was in effect on the date of the accident in question, the trial court was obligated to apply its provisions. *Id.*

Indiana's legislature recently amended Indiana's guest statute to allow recovery by passengers who are not the driver's parent, spouse, child or stepchild, brother, sister or a hitchhiker. IND. CODE § 9-3-3-1(b) (Supp. 1984) (amending IND. CODE §9-3-3-1 (1982)).

Determining what type of actions are covered by their comparative fault act has created problems in many jurisdictions.⁶ While Indiana's statute anticipated many of these problems,⁷ it remains silent as to a number of situations and doctrines, making it unclear where these doctrines are included within the Act's coverage or, in some cases, abrogated by the Act.

This article, while noting the cumulative impact of the Comparative Fault Act, discusses areas of Indiana law affected by the statute, including proximate cause, last clear chance, joint and several liability, and no-duty rules. An examination of these areas illustrates the expansive impact comparative fault will have on Indiana law.

II. THE SCOPE OF INDIANA'S COMPARATIVE FAULT ACT

Not all statutes on this topic are "comparative fault" statutes. Some acts are termed "comparative negligence."⁸ The scope of a state's comparative fault act depends on the language utilized in the act. When an act such as Indiana's is referred to as a comparative fault act, the scope of the statute is often interpreted to be more expansive than a comparative negligence statute.⁹ This is because the term "fault" is read as encompassing a greater variety of conduct than the term "negligence."¹⁰ Indiana's definition of fault indicates that the statute will cover conduct beyond mere negligence, yet the statute does place limits on the scope of its coverage.¹¹

The 1983 Indiana Comparative Fault Act covered a much broader scope of conduct than the 1984 Act, and gave credence to the idea that "fault" encompassed much more than negligent conduct. The 1983 Act defined fault as including strict tort liability, breach of warranty, and

This amendment will allow certain individuals to bring negligence actions against the driver. Thus, comparative fault will play a role in those cases. The legislature's active role in this area will probably deter the courts from finding that comparative fault impliedly repeals the guest statute. The courts are more apt to adopt the reasoning of the *Huydts* and *Davis* decisions and defer to the legislature should such an attack on the guest statute be made.

⁶See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 31-42 (1974) (discussing the broad range of problems and effects which can arise under comparative fault); Annot., 10 *A.L.R.4th* 946 (1981) (discussing whether comparative fault should apply to actions based on gross negligence or recklessness).

⁷See IND. CODE § 34-4-33-2(a) (Supp. 1984).

⁸Not every jurisdiction utilizing comparative fault has a statute; some states have judicially adopted comparative fault. However, the majority of jurisdictions adopting comparative fault have done so legislatively rather than judicially. See New Topic Serv. AM. JUR. 2D, *Comparative Negligence* § 7 (1977).

⁹See Comment, *The Role of Recklessness in American Systems of Comparative Fault*, 43 OHIO ST. L.J. 399 n.1 (1982).

¹⁰*Id.* This article will use the terms "comparative fault" and "comparative negligence" interchangeably unless indicated otherwise.

¹¹See IND. CODE § 34-4-33-10 (Supp. 1984).

misuse of a product.¹² Each of these theories encompasses concepts that are not generally associated with pure negligence actions. The 1984 Act narrowed the definition of fault. Under the 1984 Act,

“Fault” includes any act or omission that is negligent, willful, wanton, or reckless toward the person or property of the actor or others, but does not include an intentional act. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.¹³

This definition of fault no longer covers actions based on a strict liability or warranty theory.¹⁴ but retains actions based on conduct beyond ordinary negligence.¹⁵ Thus, actions based on a defendant's willful, wanton, or reckless conduct will be decided under comparative fault principles.¹⁶ However, where the conduct is intentional, no comparison

¹²IND. CODE Sec. 34-4-33-2(a) (Supp. 1983) (amended 1984). The 1983 Act stated:

“Fault” includes any act or omission that is negligent, willful, wanton, or reckless toward the person or property of the actor or others, *or that subjects a person to strict tort liability*, but does not include an intentional act. The term also includes *breach of warranty*, unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, *misuse of a product for which the defendant otherwise would be liable*, and unreasonable failure to avoid an injury or to mitigate damages.

Id. (emphasis added). The emphasized portions of the above definition were deleted by the 1984 Act. Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2(a), 1984 Ind. Acts 1468, 1468 (codified at IND. CODE Sec. 34-4-33-2(a) (Supp. 1984)). The original 1983 Act's definition of fault closely resembled the language used in the Uniform Comparative Fault Act. The Uniform Act states:

“Fault” includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

UNIF. COMPARATIVE FAULT ACT Sec. 1(b), 12 U.L.A. 35 (Supp. 1983).

The similarity between the 1983 Act and the Uniform Act would have permitted Indiana courts construing the statute to look to the comments accompanying the Uniform Act for guidance. While the 1984 Act's definition of fault eliminates some of the similarities between the Indiana Act and the Uniform Act, the Uniform Act and its comments should still be a valuable reference source where the two Acts utilize similar language.

¹³Act of Mar. 5, 1984 Pub. L. No. 174-1984, Sec. 1, § 2(a), 1984 Ind. Acts 1468, 1468 (codified at IND. CODE § 34-4-33-2(a) (Supp. 1984)).

¹⁴For a discussion of whether and how comparative fault should apply to strict liability actions, see V. SCHWARTZ, *supra* note 6, at 195-209 and H. WOODS, *COMPARATIVE FAULT* ch. 14 (1978) (containing a discussion of comparative fault and warranty actions at 263-74).

¹⁵See IND. CODE § 34-4-33-2(a) (Supp. 1984).

¹⁶See *id.* Indiana presently follows the common law rule that contributory negligence is no defense when injuries are willfully inflicted; in addition, conduct evincing a lesser degree of culpability also precludes the defense, such as conduct that has been labeled “con-

of fault will occur and traditional common law principles will be applied.¹⁷ Other types of conduct specifically included in the 1984 Act are unreasonable assumption of risk, incurred risk, and unreasonable failure to avoid injury or mitigate damages.¹⁸

While Indiana's 1984 Act attempts to clarify what type of actions are within the scope of the Act, it fails to mention a number of doctrines. Courts will eventually have to decide whether doctrines not mentioned in the 1984 Act are within its scope; the scope and application of the Act will also have to be determined in regard to those areas specifically mentioned. Although Indiana's definition of fault delineates to a degree what concepts fall under the Act, the definition does not deal with every situation that may arise, leaving the final word on the Act's scope and impact in the hands of the judiciary.

III. CAUSATION UNDER A COMPARATIVE FAULT SYSTEM

Court interpretation of how causation operates under the statute will be of central concern to any action governed by comparative fault. Before the impact comparative fault has on causation can be understood, Indiana's current law on causation must be examined.

A. *Current Status of the Law*

Indiana courts have stated that both cause in fact and proximate cause are indispensable elements of a negligence action.¹⁹ Cause in fact is determined under a "but for" test²⁰ which states that negligent conduct is not a cause in fact "if the harm would have occurred without it."²¹ Factual causation must be established before a finding of proximate cause can be made.²² Once factual causation is shown, proximate cause must be proved. For example, car *A* is pulling out of a private driveway while car *B* is driving on the road. Car *B* passes through an intersection with

structive willfulness," "wanton," or even "reckless." *McKeown v. Calusa*, 172 Ind. App. 1, 5, 359 N.E.2d 550, 553 (1977). Under the new Comparative Fault Act the need for such exceptions to common law contributory negligence is lost as the plaintiff's negligence no longer acts as a total bar to recovery.

¹⁷IND. CODE § 34-4-33-2(a) (Supp. 1984).

¹⁸*Id.* The unreasonable failure to avoid injury probably encompasses the avoidable consequences doctrine. This doctrine "denies recovery for any damages which could have been avoided by reasonable conduct on the part of the plaintiff. . . . The rule of avoidable consequences comes into play after a legal wrong has occurred, but while some damages may still be averted, and bars recovery only for such damages." W. PROSSER, LAW OF TORTS ch. 11, § 65, at 423 (4th ed. 1971).

¹⁹*See* *Havert v. Caldwell*, 452 N.E.2d 154, 158 (Ind. 1983); *City of Indianapolis v. Parker*, 427 N.E.2d 456, 461 (Ind. Ct. App. 1981); *Tabor v. Continental Baking Co.*, 110 Ind. App. 633, 643, 38 N.E.2d 257, 261 (1941).

²⁰*City of Indianapolis v. Parker*, 427 N.E.2d 456, 461 (Ind. Ct. App. 1981).

²¹*Id.* The party asserting negligent conduct on the part of another "has the burden of proving causation in fact by a preponderance of the evidence." *Id.*

²²*Tabor v. Continental Baking Co.*, 110 Ind. App. 633, 643, 38 N.W. 2d 257, 261 (1941).

a malfunctioning traffic light and collides with car A. The plaintiff, driver of car A, sues the city on the theory that the city should have maintained the traffic light in proper working order. To maintain the suit against the city, the plaintiff would have to prove that the malfunctioning traffic light did in fact cause the accident. Because the accident did not occur in the intersection, the malfunctioning light probably had nothing to do with the accident. Thus, although the city may have been negligent in not fixing the traffic light, the plaintiff cannot collect from the city because the traffic light played no part in causing the accident; in other words, no cause in fact exists. If the collision had occurred in the intersection, however, and the plaintiff introduced evidence proving the malfunctioning light to be a cause of the accident, cause in fact would exist, and the plaintiff would move on to prove proximate cause.²³

Proximate cause is defined as "that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which the result would not have occurred."²⁴ The conduct or act of a party need not be the sole proximate cause of an injury for liability to attach.²⁵ The act need only be a cause of injury.²⁶ However, Indiana courts have stated that the act must be "a substantial factor in producing the injury complained of,"²⁷ not just a remote cause.²⁸ The major test of proximate cause centers around foreseeability.

Before an act can be deemed to be the proximate cause of an injury, it must be shown that the injury was one that "was foreseen, or reasonably should have been foreseen, as the natural and probable consequence of the act or omission."²⁹ This does not mean that the specific nature of the injury or the extent of injury must be foreseen.³⁰ It need only be reasonably foreseeable "that [the] conduct will cause injury in substantially the manner in which it occurs."³¹

Generally, proximate cause is an issue of fact to be determined by the jury;³² however, "where the facts are undisputed and lend themselves to a single inference or conclusion," proximate cause becomes a question of law for the court.³³ In Indiana it is therefore possible for proximate

²³See *id.*

²⁴*Johnson v. Bender*, 174 Ind. App. 638, 643, 369 N.E.2d 936, 939 (1977).

²⁵*Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 54, 388 N.E.2d 541, 555 (1979).

²⁶*Id.*

²⁷*Tabor v. Continental Baking Co.*, 110 Ind. App. 633, 644, 38 N.E.2d 257, 261 (1941).

²⁸*Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 54, 388 N.E.2d 541, 555 (1979).

²⁹*Havert v. Caldwell*, 452 N.E.2d 154, 158 (Ind. 1983).

³⁰*Johnson v. Bender*, 174 Ind. App. 638, 643, 369 N.E.2d 936, 939 (1977).

³¹*Id.*

³²*Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 54, 388 N.E.2d 541, 555 (1979).

³³*Petroski v. Northern Indiana Pub. Serv. Co.*, 171 Ind. App. 14, 24, 354 N.E.2d 736, 744 (1976).

cause issues to be decided by either the court or jury depending upon the facts of the case. When the facts are undisputed, the court may either find that no proximate cause exists and enter summary judgment or direct a verdict for the defendant, or determine that a plaintiff's conduct was not contributorily negligent.³⁴ If the jury determines that no proximate cause is shown, a plaintiff will not be permitted to recover from the defendant. If contributory negligence has been asserted, the lack of proximate cause between the plaintiff's negligence and injury will defeat the contributory negligence defense.

B. *The Impact of Comparative Fault on Causation*

It is clear that Indiana's Comparative Fault Act has retained the requirements of both cause in fact and proximate cause. Indiana Code section 34-4-33-1(b) states that "[i]n an action brought under this chapter, legal requirements of causal relation apply to: (1) fault as the basis for liability; and (2) contributory fault."³⁵ This section clearly indicates that causation will still be a determinative factor for any case based on fault

³⁴See *Havert v. Caldwell*, 452 N.E.2d 154 (Ind. 1983). The *Havert* case illustrates the somewhat bizarre results that may be achieved when the foreseeability element of proximate cause is applied. In *Havert*, a police officer, Havert, pulled to the side of a curb to investigate a house. Another car, driven by Hook, stopped abruptly behind the police car and was then struck from the rear by a third car, driven by Caldwell. After searching for a prowler, Havert returned to the scene of the accident. Havert and Hook walked between Hook's and Caldwell's cars to examine the damage. At that time, a fourth car, driven by Warren, hit the rear of Caldwell's car pushing it forward into Hook's car which then hit the police car. Mr. Hook and Officer Havert both suffered serious personal injuries as did Mrs. Hook who was standing to one side of the cars. At the time of the accident, all of the cars were in a lane designated as a parking lane for that time of the evening. Havert and Hook sued Caldwell and Warren for their injuries.

At trial, Caldwell moved for partial summary judgment on two alternative theories. First, that his act only created a condition, and it was not reasonably foreseeable that a fourth car would run into the back of his car causing it to hit the other cars again. Therefore, Caldwell claimed his act was not the proximate cause of Havert's personal injuries. Second, Caldwell claimed that Hook and Havert were contributorily negligent in standing between the vehicles, placing themselves in very hazardous positions. The trial court granted Caldwell's motion on the theory that Hook and Havert did act with contributory negligence. The appellate court reversed, and the supreme court vacated the appellate court's ruling and granted the motion, not on the theory of contributory negligence however, but because Caldwell's actions did not constitute a proximate cause.

The supreme court first noted that no material issue of fact existed and then stated that it was not reasonably foreseeable that a car would drive in the parking lane of the roadway and strike the cars in that lane. Therefore, the court found as a matter of law that none of the plaintiffs had been contributorily negligent and that no partial summary judgment was proper on that basis. Thus the same foreseeability factor was used to declare the plaintiffs not contributorily negligent and to allow the defendant's motion for partial summary judgment on the ground that proximate cause was lacking. One interesting sidelight is that the original accident occurred while the lane was designated a parking lane and each car had been driven in that lane.

³⁵IND. CODE § 34-4-33-1(b) (Supp. 1984).

or any case in which contributory fault is raised.³⁶ Presumably, any conduct that is not shown to be causally related to the claimant's damage will not fall under the Comparative Fault Act and therefore will not be considered when fault is apportioned.³⁷ This approach is compatible with Indiana's common law approach; both require conduct to be deemed a proximate cause of the injury before it is considered in a negligence action. The problem arising under comparative fault involves either a plaintiff or defendant whose conduct is deemed to be the sole proximate cause of an injury, or a finding of "no cause in fact".³⁸

Nothing in Indiana's Comparative Fault Act indicates that the common law rules of causation will be altered under the comparative fault system. Thus, it is reasonable to assume that the substantial factor test and the foreseeability test will continue to apply.³⁹ In addition, the issue will remain one for the jury unless the facts are undisputed and lead to but one conclusion.⁴⁰ Whether the question goes to the jury or to the court may be important, because what the jury and court do with the ultimate conclusion on a given set of facts may vary somewhat.

1. *The Plaintiff's Negligence as the Sole Proximate Cause.*—Indiana adopted a modified form of comparative fault, meaning that a comparison of fault will not always lead to recovery by the plaintiff. Rather, the plaintiff is entitled to recover only when his fault is "not greater than fifty percent (50%) of the total fault."⁴¹ While the efficacy of using a 50% rule versus a pure comparative fault rule may be strongly debated,⁴² it is certain that such an approach alleviates any problem that might arise when a jury finds the plaintiff's negligence to be the sole proximate cause of his injury. Under a pure system, a finding of sole proximate cause results in the plaintiff's negligence barring recovery as in contributory negligence.⁴³ In Indiana, a jury finding that the plaintiff was over 50%

³⁶The language utilized in this section is identical to the language used in the Uniform Comparative Fault Act, except for a few minor changes. The commissioners' comments to the Uniform Act state that this language includes both the concept of cause in fact and proximate cause. UNIF. COMPARATIVE FAULT ACT Commissioners' Comments, 12 U.L.A. 35, 38 (Supp. 1983).

³⁷See *id.*

³⁸Because of the similarities in these two issues and this problem, this article will focus on the proximate cause issue as cause in fact is a prerequisite to a finding of proximate cause. The reader should, however, keep in mind that the problem occurs both when cause in fact and sole proximate cause are involved.

³⁹See *supra* notes 27-31 and accompanying text.

⁴⁰See *supra* notes 32-34 and accompanying text.

⁴¹IND. CODE § 34-4-33-5(a)(3), (b)(3) (Supp. 1984).

⁴²A large debate centers on whether a pure form or modified form of comparative fault is the best approach. For general discussions regarding the various approaches available, see V. SCHWARTZ, *supra* note 6, at 43-82; H. WOODS, *supra* note 14, at 77-90.

⁴³See V. SCHWARTZ, *supra* note 6, at 89. Under a pure comparative negligence system, "the contributorily negligent plaintiff's damages are reduced by the jury in proportion to the amount of negligence attributable to him. The jury is instructed to take this step unless plaintiff's negligence was the sole proximate cause of the harm that befell him." *Id.* at 46.

at fault has the same effect as a sole proximate cause finding in a pure system; both findings result in the plaintiff being completely barred from recovery.⁴⁴

Sole proximate cause will more directly affect the Indiana plaintiff when the court determines that no issue of material fact exists and decides the issue of causation as a matter of law.⁴⁵ If the court decides that the plaintiff's conduct was the sole proximate cause of his injury, summary judgment may be granted for the defendant. The plaintiff, therefore, never reaches the jury and his contributory negligence acts as a complete bar to any chance of recovery. The possibility of such an occurrence in Indiana should, however, be limited by two factors.

First, Indiana generally recognizes that the issue of causation is one for the jury. Therefore, in most cases, the issue will go to the jury because of a factual dispute.⁴⁶ Second, pure comparative fault jurisdictions that allow the sole proximate cause issue to be sent to the jury have been reluctant to take the issue away from the jury.⁴⁷ The courts are also reluctant to allow the jury to make a finding of sole proximate cause which results in no comparison of fault.⁴⁸ Rather, the courts ask the jury to compare the fault and apportion it accordingly.⁴⁹ Because of these factors and Indiana's less than 50% rule, the impact of sole proximate cause should be minimal when directly applied to the plaintiff under the Indiana comparative fault system.

2. *The Innocent Plaintiff and Joint and Several Liability.*—A finding by either the court or jury that the defendant was the sole proximate cause of the plaintiff's injury will create special problems in Indiana. In this situation, the court is dealing with a non-negligent plaintiff or a plaintiff whose negligence was not a proximate cause of his injury.⁵⁰ One's inclination is to conclude that the negligent defendant will be liable. However, the issue is no longer whether the defendant is liable (assuming he has been found negligent), but whether he is liable under a comparative fault or common law analysis. The importance of this question becomes apparent when one considers that Indiana's statute may have eliminated

⁴⁴See IND. CODE § 34-4-33-5(a)(2), (b)(2) (Supp. 1984).

⁴⁵See *Havert v. Caldwell*, 452 N.E.2d 154, 156 (Ind. 1983).

⁴⁶*Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 54, 388 N.E.2d 541, 555 (1979). The benefit for a plaintiff in having the causation issue go to the jury is that the jury will be more apt than the judge to find the plaintiff less contributorily negligent. However, it is probable that if the judge considers the plaintiff's negligence to be the sole proximate cause of his injury, the jury, while not finding sole proximate cause, would find the plaintiff to be over 50% at fault. This again would result in the plaintiff being barred from recovery. It is therefore questionable how much of a benefit is derived in Indiana by having the issue go to the jury. There is, however, the possibility that the jury would find the plaintiff to be less than 50% at fault and permit recovery.

⁴⁷See H. Woods, *supra* note 14, at 96-101.

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰See *infra* notes 76-87 and accompanying text.

joint and several liability.⁵¹ If comparative fault is applied in situations involving a non-negligent plaintiff, the non-negligent plaintiff's recovery may be severely limited due to immune, insolvent, or nonparty defendants.⁵² There are two possible approaches to this problem. One approach is to *not* apply comparative fault to this type of situation and revert back to common law rules of joint and several liability. A second approach is to apply comparative fault and apportion the fault among the defendants. This latter approach disregards the fact that the plaintiff has no fault and presumably leaves the plaintiff to carry the burden of the unavailable or insolvent defendant.⁵³

a. Goals of a comparative fault statute.—The major rationale behind the development and adoption of comparative fault is the desire to do away with the harsh, arbitrary rule of contributory negligence.⁵⁴ Comparative fault is aimed at a comparison of the fault of the plaintiff with the fault of the defendant.⁵⁵ By comparing fault, the system permits a plaintiff to recover even when he has been contributorily negligent, but the recovery is reduced in relation to his share of fault. Thus, the fault comparison alleviates the harsh "all or nothing" effect of common law contributory negligence. The use of comparative fault where the plaintiff has no fault is questionable because comparative fault is aimed at a comparison between plaintiff and defendant, not defendant and defendant.⁵⁶

Indiana's statute states that "any action based on fault" will be covered by the statute.⁵⁷ Does this imply that the statute will apply even when the plaintiff has no fault? Considering this question, one must keep in mind that the statute is in derogation of the common law and must

⁵¹See IND. CODE §§ 34-4-33-4 to -5 & -7 (Supp. 1984). For a discussion of the possible repercussions of these sections of joint and several liability, see Wilkins, *supra* note 4, at 718.

⁵²See IND. CODE §§ 34-4-33-4 to -6 (Supp. 1984). These sections require apportionment of fault to all individuals at fault whether a party to the action or not. While the nonparty is not technically a defendant, he is referred to as such for convenience in this article. Because the nonparty is not a defendant in the action, an apportionment of fault is not binding on the nonparty and the plaintiff cannot actually collect that portion of damages from the nonparty.

⁵³An argument can be made that joint and several liability has not been abrogated by the statute. See Wilkins, *supra* note 4, at 718. However, even if Indiana courts determine that joint and several liability has been abrogated, the loss occasioned by an insolvent or unavailable defendant need not fall entirely on even a contributorily negligent plaintiff. Instead, the loss could be distributed by proportion of fault among the actual parties to the action. See S. SPEISER, KRAUSE & GANS, 1 THE AMERICAN LAW OF TORTS 418 (1983) [hereinafter cited as SPEISER, Wilkins, *supra* note 4, at 718.

⁵⁴See Wade, *Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299 (1980).

⁵⁵Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 n.2 (1953). See also V. SCHWARTZ, *supra* note 6, at 31.

⁵⁶See Prosser, *supra* note 55, at 465 n.2. See also *infra* text accompanying notes 58-59.

⁵⁷IND. CODE § 34-4-33-1(a) (Supp. 1984).

be strictly construed.⁵⁸ Therefore, questions arising due to vagueness or ambiguities in the statute must be resolved in favor of the common law.⁵⁹

Section 3 of the statute indicates that "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages . . . but does not bar recovery"⁶⁰ This section restates the basic purpose of comparative fault which is to alleviate the common law effect of contributory negligence. The section focuses on situations in which the plaintiff has been contributorily negligent.

A similar focus is indicated in the damage sections of the Act.⁶¹ While these sections speak of apportioning fault among the defendants, they do so only after stating that the plaintiff's percent of fault must be determined. If the plaintiff's fault is over 50%, he is denied recovery, just as he would be under a common law approach.⁶² Following this determination, the jury is instructed to "determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded."⁶³ The use of the words "if contributory fault were disregarded" implies that the jury is dealing with a contributorily negligent plaintiff. Throughout the Act, reference is consistently made to situations in which both the plaintiff and defendant have been negligent. This focus on the plaintiff's negligence indicates that the Act is truly aimed at achieving the goal of comparative fault—negating the "all or nothing" rule of common law. Because of this focus, the Act should not be applied in situations where the plaintiff has not been contributorily negligent.

Defendants may argue that such an approach is not appropriate because the statute is aimed at a comparison of fault among all individuals, regardless of whether they are a party to the action or not.⁶⁴ The statute,

⁵⁸Connecticut Mut. Life Ins. Co. v. King, 47 Ind. App. 587, 593, 93 N.E. 1046, 1048 (1911).

⁵⁹See, e.g., Stayner v. Nye, 227 Ind. 231, 289, 85 N.E.2d 496, 499 (1949); B.G.L. v. C.L.S. 175 Ind. App. 132, 137, 369 N.E.2d 1105, 1108 (1977); Hummer v. School City of Hartford City, 124 Ind. App. 30, 49, 112 N.E.2d 891, 900 (1953); Universal Discount Corp. v. Brooks, 115 Ind. App. 591, 596, 58 N.E.2d 369, 371 (1945); Connecticut Mut. Life Ins. Co. v. King, 47 Ind. App. 587, 593, 93 N.E. 1046, 1048 (1911).

⁶⁰IND. CODE § 34-4-33-3 (Supp. 1984).

⁶¹IND. CODE § 34-4-33-5 (Supp. 1984).

⁶²*Id.*

⁶³*Id.* § 5(a)(3), (b)(3).

⁶⁴Support for such an argument is found in the nonparty defense section of the statute. IND. CODE § 34-4-33-10 (Supp. 1984). The nonparty defense is not without limitations in Indiana. The defendant must affirmatively assert the defense and carries the burden of proving nonparty fault. *Id.* § 10(b). In all situations, the defense must be pleaded with reasonable promptness, however, under certain circumstances, special time limitations are imposed. If the defendant knows of the defense at the time he files his first answer, he must assert the defense in that answer. *Id.* § 10(c). If the defendant was served with a complaint 150 days before the expiration of the statute of limitations applicable to the plaintiff's claim against the nonparty, the defendant must assert the defense at least 45 days before the

however, also states that "[i]f the percentage of fault of the claimant is not greater than fifty percent (50%) of the total fault, the jury then shall determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded."⁶⁵ Defendants can argue that when the plaintiff's fault is zero, an allocation still occurs because the fault is less than fifty percent. As previously noted, this section of the statute focuses on the amount of damages set by disregarding the "contributory negligence." This implies that the plaintiff has been contributorily negligent. A strict construction of the statute, therefore, results in no application of the statute and the retention of joint and several liability when an innocent plaintiff is involved.

b. Goals of tort law and joint and several liability.—Retaining joint and several liability is consistent with the goals of tort law. It is generally agreed that the primary goal of tort law is prevention of injury, and failing in that objective, compensation to injured parties and loss distribution.⁶⁶ It is recognized that

[t]he defendants in tort cases are to a large extent public utilities, industrial corporations, commercial enterprises, automobile owners, and others who by means of rates, prices, taxes or insurance are best able to distribute to the public at large the risks and losses which are inevitable in a complex civilization. Rather than leave the loss on the shoulders of the individual plaintiff, who may be ruined by it, the courts have tended to find reasons to shift it to the defendants.⁶⁷

This approach is reasonable because corporate defendants and insurance companies can anticipate a certain number of losses each year and adjust their prices, rates, or insurance coverage accordingly.⁶⁸ The individual plaintiff, however, has no such foresight or adjustment mechanism available to him.⁶⁹

statute of limitations expires. *Id.* The trial court, however, is given discretion to alter these time limitations. *Id.* This section gives plaintiffs an incentive to file their claims reasonably early, as the plaintiff is permitted to amend his complaint to add the nonparty as a defendant so long as the applicable statute of limitations has not run. *Id.* § 10(c)(2).

Other limitations are also placed on the defense. For example, a nonparty cannot be the plaintiff's employer. *Id.* § 2(a). Finally, if fault is applied to a nonparty, the nonparty is to be identified by name. *Id.* § 34-4-33-6. Presumably this will prevent fault allocation to phantoms and guard against fraudulent assertions of the nonparty defense.

⁶⁵IND. CODE § 34-4-33-5(a)(3) (Supp. 1984).

⁶⁶See W. PROSSER, *supra* note 18, at 1-27.

⁶⁷*Id.* at 22.

⁶⁸The justification for having insurance in our society is that it spreads the risk from a single entity to all insureds to prevent the victim of the loss from being ruined. Thus, the law distributes the loss among defendants at fault. Whether one wishes to emphasize the accident prevention feature of the tort system or the loss allocation/risk spreading feature, the result has always been to assign responsibility where its assignment will provide incentives to reduce risks and prevent future losses.

⁶⁹While the plaintiff can purchase health insurance, the coverage provided is usually

Under a system of joint and several liability, an insurance company for the defendant may be required to pay for the fault assigned to an insolvent or absent defendant. Again, this system operates consistently with the overall tort goal of loss distribution. Indiana, along with a majority of other states, has made a value judgment to protect an injured plaintiff from the risk of an insolvent defendant by applying joint and several liability.⁷⁰ To put the risk on the plaintiff ignores the fact that insurance companies are in a better position to bear the loss. They have the ability to anticipate the likelihood of such additional losses through statistical experience and large-scale projections, and can take steps to protect against this burden. In addition, insurance companies have the ability and the right to pass the additional burden to thousands or millions of others through minute premium increments.⁷¹ Because of the policies behind insurance programs and the potentially devastating effects on plaintiffs, joint and several liability should be retained.

The allocation of liability to defendants is also based on the idea that the defendant has done something socially unacceptable, and therefore should bear the cost of the loss caused by his conduct.⁷² Accompanying this idea is the prevention of socially unacceptable behavior.⁷³ By placing liability on the manufacturer of a defective product, it is hoped the manufacturer will be encouraged to utilize available engineering technology to produce safe products.⁷⁴ As between a negligent defendant and an in-

inadequate to cover all the losses occasioned by an injury, leaving the plaintiff to bear the burden of his loss unless he successfully seeks recovery through the legal system.

⁷⁰See SPEISER, *supra* note 53, at 392-98. "[E]ven though persons are not acting in concert, nevertheless if the result produced by their acts is indivisible, each person is liable for the whole because the law is loath to permit an innocent plaintiff to suffer as against a wrongdoer defendant." *Id.* at 398. Speiser also discusses the distribution problems specifically associated with insolvent parties, noting that allocation on a fault basis among the solvent defendants and the plaintiff appears to be the fairest approach. Thus, the innocent plaintiff would not be forced to assume any of the loss even if joint and several liability were not utilized. *Id.* at 417-18.

⁷¹Indeed, Indiana insurance companies are uniquely able to adjust their rates. They are subject only to an after the fact review by the Indiana Insurance Commissioner. An industry spokesman recently credited such favorable legislation with providing the climate that makes Indiana the number one state in the country in which to underwrite insurance:

In Indiana, if an insurance firm or a group working through a rating company determines that an increase or decrease is needed, a new rate structure can be developed. The new amount is filed with the Indiana Department of Insurance and immediately goes into effect. The department then has a specified number of days in which to review all data and to accept or disagree with the rate. If the insurance commissioner questions anything, he can issue a cease and desist order and automatically cause the rate to revert to the amount prior to filing.

Vernon, *Indiana Insurance*, 27 INDIANA BUSINESS 14, 15 (1983).

⁷²W. PROSSER, *supra* note 18, at 18.

⁷³*Id.* at 21.

⁷⁴Technology has developed into a number of specialized areas aimed at the production of safe products. The use of reliability engineering, human factors engineering, quality assurance engineering, and system safety engineering can prevent the production of unsafe

nocent plaintiff, the cost distribution and deterrence factors are better served by placing losses on the defendant rather than the plaintiff.

c. *The continuing need to apply joint and several liability.*—For over one hundred years, it has been held that the goals of the tort system are best achieved by utilizing joint and several liability.⁷⁵ At common law, two situations give rise to joint and several liability—where the defendants act in combination to cause harm,⁷⁶ and where the defendants act independently but cause indivisible harm.⁷⁷ Liability in the case of harm caused by concerted action is imposed on all defendants even though caused by only one of them.⁷⁸ For example, *B* and *C* are drag racing and *C* runs over *A*. *B* and *C* are jointly and severally liable for *A*'s death or injury. Joint and several liability will be imposed where the defendants act independently, each actually causing harm to the plaintiff but under circumstances where it is impossible to allocate harm to each defendant.⁷⁹ Thus if *A* were a passenger in *B*'s taxi which collided with *C* when both *B* and *C* were speeding, *B* and *C* would be jointly and severally liable.

On the other hand, if the tortious conduct was not joint or if the elements of the injury are separable, a defendant is responsible only for the harm he actually caused.⁸⁰ For example, the collision between the speeding vehicles of *B* and *C* results in serious injury to *A*, which keeps him from work for six months. His lost wages are \$15,000 and he has \$30,000 in medical and hospital expenses. *A* sues both *B* and *C* and recovers damages of \$150,000. The jury finds *B* 60% responsible and *C* 40% responsible. If the injury is indivisible, *B* and *C* are jointly and severally liable for the damages.⁸¹ *A* may go to either defendant and demand full payment of his judgment.

If the comparative fault statute is interpreted as eliminating the doctrine of joint and several liability, *A*, even though free from fault, may not be able to collect his judgment in full. The risk that one of the wrongdoers may not be able to pay any of his share of the judgment is transferred from fellow defendants to the innocent plaintiff when joint and several liability is eliminated. To illustrate, suppose the jury, in the speeding vehicle example, found each of the defendant drivers 50% at fault and *C*, one of the defendants, was uninsured and insolvent. The plaintiff's maximum recovery would be \$75,000 or 50% of his damages.

products; yet, some manufacturers fail to take advantage of these systems of analysis. The imposition of liability for defective products will encourage the use of safety oriented technology, resulting in fewer unreasonably dangerous products.

⁷⁵See W. PROSSER, *supra* note 18, at 297-98.

⁷⁶SPEISER, *supra* note 53, at 390-93.

⁷⁷*Id.* at 393-98.

⁷⁸*Id.* at 390-93.

⁷⁹*Id.* at 393-98.

⁸⁰*Id.* at 392-94.

⁸¹*Id.* at 393-94.

If *A*, the plaintiff, were traveling in the course of his employment, the worker's compensation lien, attorney's fees, and litigation expenses would consume most of his recovery.⁸² If the allocation of fault between the defendants was 25% and 75%, and the 75% defendant was insolvent, the effect on the plaintiff would be even more devastating, as the plaintiff is left to bear 75% or \$112,500 of a loss he did not cause. Between the innocent plaintiff and the negligent defendant, it is better to allocate the loss to the defendant.⁸³

Cases in which the plaintiff has not been contributorily negligent should be excluded from the Comparative Fault Act. This exclusion will place a new importance on the operation of sole proximate cause. In situations where the jury determines that the defendant or defendants were the sole proximate cause of the plaintiff's injury, there should be no instruction regarding comparative fault. No comparison is necessary with an innocent plaintiff. The statute focuses on situations involving a negligent plaintiff, and comparing the plaintiff's fault with the defendants'. When the defendants alone are negligent, jurors should not compare fault. Their job is to arrive at a damage figure for which the defendants will be jointly and severally liable.⁸⁴ Such an approach is best-suited to the overall loss allocation and deterrence goals of the tort system.

IV. COMPARATIVE FAULT'S IMPACT ON OTHER DOCTRINES

While Indiana's comparative fault statute specifically includes several areas and doctrines, there are a number of areas left open to question, including areas involving the last clear chance doctrine and no-duty rules. The impact of comparative fault on these areas illustrates the potentially expansive reach of the Act.

A. Last Clear Chance

The major issue surrounding last clear chance is whether the doctrine survives the adoption of comparative fault. Indiana currently recognizes

⁸²An employer's lien for worker's compensation benefits is provided for in Indiana Code section 22-3-2-13. IND. CODE § 22-3-2-13 (1982).

⁸³The best approach would be the retention of joint and several liability in all situations, thus supporting and achieving the public policies behind the tort system. However, if the comparative fault statute has indeed done away with joint and several liability, then the statute should be strictly construed to apply only when the plaintiff has been contributorily negligent. Then at least, the innocent plaintiff will not be forced to bear losses which he had no part in causing. See *Lynn v. Taylor*, 7 Kan. App. 2d 369, 372, 642 P.2d 131, 135 (1982) (when culpable conduct is the fraud of one defendant and the negligence of another, a tort-feasor found guilty of fraudulent concealment may be held jointly and severally liable with the negligent tort-feasor). But see *Scales v. St. Louis-S.F.R. Co.*, 582 P.2d 300 (1978) (where plaintiff could recover only 50% of damages from defendant even though the other 50% of fault was placed on plaintiff's employer who was protected under worker's compensation laws).

⁸⁴In states where joint and several liability has been retained the problem of an inno-

the doctrine of last clear chance.⁸⁵ Under this doctrine, a plaintiff's negligence will not prevent his recovery against a negligent defendant if the defendant, by the exercise of reasonable care, had a later opportunity to avoid injuring the plaintiff.⁸⁶ The doctrine applies, however, only to situations in which the defendant has both actual knowledge of the plaintiff's peril and a later opportunity to avoid the injury.⁸⁷ If the plaintiff has an opportunity to remove himself from danger, then he must do so.⁸⁸ Indiana generally designates "last clear chance a doctrine of causation."⁸⁹ This is based on the theory that "the defendant's 'final negligence' is to be considered the sole proximate cause of the injury."⁹⁰

Because Indiana's comparative fault statute fails to specifically deal with last clear chance, it is questionable whether the doctrine has been abrogated. Generally, last clear chance is thought of and treated as a doctrine aimed at the modification of the contributory negligence doctrine.⁹¹ Two approaches justifying the use of the doctrine developed under common law. One approach, utilized by Indiana, declares the defendant's later negligence the sole proximate cause of the plaintiff's injury.⁹² The other approach terms the defendant's later negligence worse than the plaintiff's and allows the plaintiff to recover from the defendant in spite of the contributory negligence.⁹³ Under either approach, the usefulness of last clear chance is called into question under a comparative fault system.⁹⁴

The causation approach, which Indiana follows, appears to operate as a form of sole proximate cause. However, distinct differences are apparent. Under a normal causation analysis, the jury or court determines whether the plaintiff's negligence was both a cause in fact and a proximate cause of his injury. As noted, the focus is on the foreseeability

cent plaintiff is less important because even if apportionment among the defendants took place, the plaintiff could recover the whole amount from one defendant.

⁸⁵See *McKeown v. Calusa*, 172 Ind. App. 1, 359 N.E.2d 550 (1977); *Bates v. Boughton*, 151 Ind. App. 139, 278 N.E.2d 316 (1972); *Stallings v. Dick*, 139 Ind. App. 118, 210 N.E.2d 82 (1965).

⁸⁶*Bates v. Boughton*, 151 Ind. App. 139, 141, 278 N.E.2d 316, 318 (1972) (quoting *National City Lines v. Hurst*, 145 Ind. App. 278, 282, 250 N.E.2d 507, 510 (1969)).

⁸⁷*Bates v. Boughton*, 151 Ind. App. 139, 141, 278 N.E.2d 316, 318 (1972).

⁸⁸*Id.*

⁸⁹*McKeown v. Calusa*, 172 Ind. App. 1, 6, 359 N.E.2d 550, 554 (1977).

⁹⁰*Id.*

⁹¹H. WOODS, *supra* note 14, at 176 (quoting *Cushman v. Perkins*, 245 A.2d 846 (Me. 1968)).

⁹²W. PROSSER, *supra* note 66, at 427. See also *McKeown v. Calusa*, 172 Ind. App. 1, 6, 359 N.E.2d 550, 554 (1977).

⁹³W. PROSSER, *supra* note 66 at 428.

⁹⁴For a more in depth look at this problem, see Note, *Torts: Comparative Negligence and the Doctrine of Last Clear Chance—Are They Compatible?* 28 OKLA. L. REV. 444 (1975); Note, *The Doctrine of Last Clear Chance—Should It Survive the Adoption of Comparative Negligence in Texas?* 6 TEX. TECH L. REV. 131 (1974).

of injury arising from the conduct.⁹⁵ Under last clear chance, the plaintiff's conduct could technically be a cause of his injury, but because the defendant could have prevented the injury, the plaintiff's conduct is not deemed a cause. For example, assume the plaintiff is standing on a railroad track unaware that a train is approaching. The engineer of the train is aware of the plaintiff's presence and peril but fails to take any corrective action. The plaintiff, unaware of his peril, technically cannot remove himself from the danger. The defendant could do one of two things to avoid hitting the plaintiff: blow the train whistle, or attempt to stop the train. In this case, the defendant assumes the plaintiff will remove himself from danger and does nothing. The plaintiff is struck by the train and severely injured. Two results are possible depending on whether last clear chance is applied in a comparative fault system. Under comparative fault where last clear chance is not applied, the negligence of the plaintiff in standing on a train track will normally be compared to the negligence of the defendant in not blowing the whistle or stopping the train. If last clear chance survives and is applied, the jury may find that the defendant's negligence should be deemed the sole proximate cause of the accident because the negligent plaintiff was unaware of the danger and was unable to remove himself from peril. The defendant engineer, however, could have avoided the accident by blowing the train whistle, and therefore is made to assume full responsibility for causing the accident.

Defendants can argue that the above hypothetical illustrates the reason why last clear chance should not be retained under a comparative fault system. The doctrine defeats the goal of comparative fault by avoiding a comparison when both the defendant and plaintiff have been negligent. Calling the defendant's negligence the sole proximate cause under a contributory negligence system was useful because it prevented barring the plaintiff from any recovery when the defendant could have avoided injuring the plaintiff.⁹⁶ Under a comparative fault system, however, the plaintiff is not barred from recovery. Rather, the amount of recovery is reduced in proportion to the amount of his fault.⁹⁷ Because the last clear chance doctrine results in no comparison of fault, and because comparative fault accomplishes the goals sought by last clear chance, defendants will conclude that the doctrine should not survive the adoption of comparative fault.

⁹⁵See *supra* notes 24-31 and accompanying text.

⁹⁶It is arguable that the concept of defendant as sole proximate cause remains viable under comparative fault as "the jury can still find [the] defendant's negligence as the sole proximate cause and not be required to apportion damages at all." V. SCHWARTZ, *supra* note 6, at 37 (Supp. 1981) (footnote omitted). Under such an approach plaintiffs who have been over 50% negligent would still be permitted to recover if the jury determined their negligence was not a proximate cause of the injury. See *infra* text accompanying notes 98-99.

⁹⁷In Indiana, if the plaintiff's fault is over 50% he will receive no recovery. IND. CODE § 34-4-33-5(a)(2), (b)(2) (Supp. 1984).

Plaintiffs can reply to the above argument by stating that Indiana's comparative fault statute retains the requirement of legal cause.⁹⁸ The statute's purpose is not to alter Indiana requirements but merely to apportion fault where legal requirements of causation have already been met. In the example of the plaintiff on the train tracks, legal cause is not present because the defendant could have avoided any injury to the plaintiff but failed to take measures to avoid the injury. Indiana courts have made a policy determination that under such circumstances, the defendant will be deemed to be the sole proximate cause of the accident. The plaintiff's fault is, therefore, irrelevant as it was not a proximate cause of the accident. Last clear chance remains useful under comparative fault because it encourages accident prevention in situations where the plaintiff is unaware of a present danger and the defendant both knows of the danger and can avoid injuring the unwary plaintiff.⁹⁹ Because of its accident prevention function, plaintiffs will argue that last clear chance should be retained under comparative fault.

The ultimate decision of whether last clear chance survives the passage of the Comparative Fault Act will fall on the Indiana courts. Should the courts determine that comparative fault has abrogated the need for last clear chance, plaintiffs' attorneys will lose a useful tool for situations in which their clients' actions, in a technical sense, created the potential for injury and the defendants' actions brought the potential to reality by failing to avoid injuring the plaintiff.

B. *No-Duty Rules*

The introduction of comparative fault will create special problems with a number of no-duty rules. A no-duty rule states that a person's conduct cannot be labeled negligent or contributorily negligent because the person has no duty to act under common law. For example, several jurisdictions, including Indiana, do not recognize a common law duty to wear seat belts. Because there is no duty to wear a seat belt, the failure to wear one cannot be deemed contributory negligence even though the failure to wear the seat belt may result in increased damages, or actually cause the accident. Under comparative fault, this approach creates a problem because the failure to wear a seat belt contributed to the injury, but the no-duty rule operates to deny a comparison of fault.¹⁰⁰ The issue is whether no-duty rules survive the passage of comparative fault when the questioned conduct in fact contributes to or causes the injury but the no-duty rule results in the conduct being declared non-negligent. Because of the conflict between no-duty rules and comparative fault, it is probable that the no-duty rules will be challenged and re-evaluated after the Comparative

⁹⁸*Id.* § 34-4-33-1(b). See *supra* notes 33-36 and accompanying text.

⁹⁹See *supra* notes 86-90 and accompanying text.

¹⁰⁰See *infra* text accompanying notes 129-170.

Fault Act takes effect. Two no-duty rules will be examined to illustrate how a re-evaluation could operate.

1. *The Open and Obvious Danger Rule.*—The open and obvious danger rule does not focus purely on the plaintiff's conduct and operates in a unique fashion in Indiana. It states that a defendant is relieved of any duty to manufacture and distribute a safe product if the dangers of the product are open and obvious.¹⁰¹ This rule is based on the theory that a plaintiff who is confronted by an apparent danger should be barred from recovery because of his failure to avoid the danger. While the majority of jurisdictions treat the open and obvious danger as just a factor to be considered in the application of the incurred risk doctrine,¹⁰² Indiana opted for the stricter no-duty rule approach.¹⁰³ Under this rule,

¹⁰¹Bemis v. Rubush, 427 N.E.2d 1058 (Ind. 1981).

¹⁰²See Phillips, *Products Liability: Obviousness of Danger Revisited*, 15 IND. L. REV. 797 (1982).

¹⁰³*Id.* Indiana's approach to the open and obvious danger rule raises several questions. First, is the open and obvious danger rule appropriate for the social and economic needs of Indiana? Second, why did Indiana join a shrinking minority of states in accepting this doctrine? The open and obvious danger rule was not a natural outgrowth of the common law in Indiana. It was a dramatic change in the tort law that ignored the principle of stare decisis and the basic rationale of products liability law as it was developing in Indiana. Indiana adopted the rationale of *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950), a 1950 New York Court of Appeals decision. See Bemis v. Rubush, 427 N.E.2d 1058 (Ind. 1981). However, *Campo* had been expressly overruled and rejected by New York in *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

Finally, one must ask whether it is acceptable social and public policy to say that when a machine or condition has a defect that should or must be obvious to all, there is no duty to make any effort to reduce the danger. If scientific, engineering and safety knowledge provide a safer alternative that is technologically and economically reasonable to control a dangerous machine or condition, there should be a corresponding duty to utilize such knowledge. The law should provide incentives to utilize safer and more efficient alternatives.

The open and obvious danger rule insulates the careless contractor and gives immunity to manufacturers who give inadequate attention to quality and safety. The rule also creates a potential for disaster to those who must live and work around unreasonably dangerous machines or conditions. It assumes that all courts can understand and anticipate the dangers human perception and motor behavior are capable of perceiving when individuals come in contact with grossly dangerous machines or conditions. Even worse, it assumes that individual users and not manufacturers are responsible for safety. The fallacy behind such reasoning is best illustrated by an example. Patricia Barry, in a paper titled *Individual Versus Community Orientation in the Prevention of Injuries*, 4 PREVENTIVE MEDICINE 47 (1975), noted that 150-200 infants die annually in crib accidents, and an additional 40,000 babies are injured seriously enough to require medical attention. *Id.* at 50. Prior to the passage of the Consumer Product Safety Act (CPSA) of 1972, accident prevention to babies in cribs was placed on parents who were directed to watch their children more closely. With the passage of the CPSA, the focus shifted to manufacturers and the space between crib bars was required to be narrowed. Such regulation "should virtually eliminate strangulation by cribs. The Consumer Product Safety Commission operates under a public health philosophy; its attention is addressed to hazardous products, not to individual users. By virtue of its philosophy as much as its authority, it has a tremendously far-reaching potential

an individual will have a cause of action when he is injured while using a somewhat unreasonably dangerous product whose danger is not appreciated. However, where the danger or hazard is open and obvious, the individual has no cause of action and the manufacturer has no duty to protect potential users. Presumably, this means a manufacturer could remove the protective cage from a household fan and not be liable because the danger of the turning fan blade is open and obvious. Thus, there is immunity in Indiana for the most defective and dangerous products. The approach is illogical under a contributory negligence system,¹⁰⁴ and becomes even more so under a comparative fault system.

While Indiana's 1984 Comparative Fault Act no longer covers cases brought in strict products liability,¹⁰⁵ the problem created by the open and obvious danger rule has been aggravated by a recent judicial expansion of the rule. The Indiana Court of Appeals in *Law v. Yukon Delta, Inc.*¹⁰⁶ stated that the open and obvious danger rule would apply "in all negligence actions not merely those involving claims based upon products liability."¹⁰⁷ The court stated:

[A]ll negligence actions involve the same closed set of prima facie elements as a basis of recovery whether they sound in products liability or otherwise. Further, the "open and obvious danger" rule is a consistent and logical factor to consider when determining whether a person has acted in an ordinary and reasonable fashion. A person that engages in activity with the knowledge that he is exposing himself to an open and obvious danger can hardly be regarded reasonable or prudent.¹⁰⁸

Under *Law*, the open and obvious danger no-duty rule applies to all negligence actions and so will be applied under the Comparative Fault Act. The validity of the open and obvious danger rule will be subject to question under the comparative fault system because of this expansion. However, in examining the validity of the rule, the courts will probably consider the rule's use in strict product liability cases, as well as negligence cases, although comparative fault applies only to the latter.¹⁰⁹

in injury control." *Id.* at 52. Indiana's no-duty approach to open and obvious danger ignores and defeats the injury control aspect of the tort system. It took New York 26 years to note that "[t]he time ha[d] come to depart from the patent danger rule enunciated in *Campo v. Scofield*" and to reject the doctrine. Indiana courts should again follow New York, and the majority of jurisdictions, in abolishing the open and obvious danger rule.

¹⁰⁴For a discussion of the open and obvious danger rule under a contributory negligence system, see Phillips, *supra* note 102.

¹⁰⁵Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2(a), 1984 Ind. Acts 1468, 1468 (codified at IND. CODE § 34-4-33-2(a) (Supp. 1984) amending IND. CODE §34-4-33-2(a) (Supp. 1983)).

¹⁰⁶458 N.E.2d 677 (Ind. Ct. App. 1984).

¹⁰⁷*Id.* at 679.

¹⁰⁸*Id.* But see *Bridgewater v. Economy Eng'g Co.*, 464 N.E.2d 14, 18 (Ind. Ct. App. 1984).

¹⁰⁹See *supra* notes 12-15 and accompanying text.

The open and obvious danger rule is similar to the assumption of risk defense in that both rules look at the plaintiff's conduct and his proceeding to use a product in spite of a danger that is known or should have been known.¹¹⁰ A majority of comparative fault jurisdictions dealing with the open and obvious danger issue properly allow the evidence as a factor to be weighed against the defendant's negligence.¹¹¹ Is it possible that the legislative adoption of comparative fault may call for the rejection of the open and obvious danger rule in its present form?

The Supreme Court of Minnesota recently dealt with this issue in *Holm v. Sponco Manufacturing, Inc.*¹¹² The *Holm* court looked at a number of factors in specifically rejecting the open and obvious danger rule, as outlined in the earlier Minnesota decision of *Halvorson v. American Hoist & Derrick Co.*¹¹³ In *Halvorson*, the court held that a manufacturer did not owe a plaintiff "any duty to install safety devices on its crane to guard against the risk of electrocution when the record demonstrated that [the] risk was: (1) Obvious; (2) known by all of the employees involved; and (3) specifically warned against."¹¹⁴ The *Holm* court rejected this approach by first taking note of the confused state of the law in Minnesota following the *Halvorson* decision.¹¹⁵ The court also noted the current trend in products liability law:

"The modern trend in the nation is to abandon the strict patent danger doctrine as an exception to liability and to find that the obviousness of the defect is only a factor to be considered as a mitigating defense in determining whether a defect is unreasonably dangerous and whether [the] plaintiff used that degree of reasonable care required by the circumstances."¹¹⁶

An examination of the policies behind manufacturer liability followed. The court noted that in modern day life, it is often difficult to fully comprehend the scope of the danger presented by complicated machines. Because the manufacturer is in a superior position to recognize and cure defects, an increased responsibility is placed on the manufacturer to assure that finished products are not defective. This imposition of responsibility was deemed to be in the public interest and justified because it induces the manufacturer to exercise care to avoid introducing products which create an unreasonable risk of harm to persons exposed to the product when the product is being used in a reasonably foreseeable manner.¹¹⁷

¹¹⁰Phillips, *supra* note 102, at 804.

¹¹¹*Id.*

¹¹²324 N.W.2d 207 (Minn. 1982).

¹¹³307 Minn. 48, 240 N.W.2d 303 (1976).

¹¹⁴*Id.* at 57, 240 N.W.2d at 308.

¹¹⁵324 N.W.2d at 210.

¹¹⁶*Id.* at 211 (quoting *Auburn Mach. Works Co. v. Jones*, 366 So. 2d 1167, 1169 (Fla. 1979)).

¹¹⁷324 N.W.2d at 212.

Such a duty of care is reasonable in light of the policies underlying strict liability. One of these policies is to achieve a distribution of economic losses caused by a product. The manufacturer is in a better position to allocate the losses caused by the product than the individual consumer who is injured. The manufacturer is also better able to guard and protect against the risk of injury created by a product. The imposition of the open and obvious rule defeats both of these policies. First, the plaintiff is forced to assume the entire loss caused by the dangerous product. Second, the manufacturer, rather than being discouraged from producing and marketing dangerous products, is encouraged "to be outrageous in [its] design, to eliminate safety devices, and to make hazards obvious."¹¹⁸ Based on these policies of cost allocation and accident prevention, the Minnesota court rejected the open and obvious danger rule as a complete defense.¹¹⁹

The *Holm* court also noted another important factor. Minnesota's legislature had specifically changed Minnesota's comparative negligence statute to a comparative fault statute.¹²⁰ In the fault statute, the legislature provided that contributory fault, including unreasonable assumption of risk and unreasonable failure to avoid an injury, barred recovery only when that fault was greater than the fault of the defendant. "The latent-patent defect rule makes obviousness a complete bar to recovery. It circumvents [the comparative fault statute] and swallows up the assumption of the risk defense. This result is contrary to the public policy of apportioning loss between blameworthy plaintiffs and defendants."¹²¹ Thus the open and obvious danger rule was rejected because it conflicted with the comparative fault statute.¹²² In its stead, the court applied a reasonable care balancing test.¹²³ Such a test places the burden of care in proper perspective. The obvious danger rule places the entire duty of care on the consumer. In a high-technology society, such a burden on the consumer is inappropriate. The consumer should be able to assume that producers of products have used the skill and resources available to them to produce a product that is not unreasonably dangerous to the consumer.¹²⁴ By the use of a reasonable care test, the court in *Holm* re-

¹¹⁸*Id.* at 213 (quoting *Auburn Mach. Works Co. v. Jones*, 366 So. 2d 1167, 1170 (Fla. 1979)).

¹¹⁹324 N.W.2d at 213.

¹²⁰*Id.*

¹²¹*Id.*

¹²²*Id.*

¹²³*Id.*

¹²⁴The reasonable care approach in evaluating corporate conduct has been recognized in connection with products liability actions. A recent report prepared by Dr. Leslie Ball, the former National Safety Director for NASA, discusses the standards of care imposed on manufacturers to achieve production of safe products. The report notes that damages are available in products liability actions when the plaintiff proves (a) the manufacturer's engineers, through the use of available predictive analyses, should have foreseen the possibility of the occurrence of the accident producing events, (b) the specific design or manufacturing

quired both the manufacturer and the consumer to take appropriate precautions and thus safety was promoted rather than defeated. When the manufacturer is required to produce safe products, the plaintiff who is distracted or fatigued in the workplace is placed in a less hazardous position because the machine he uses will have proper safety guards and devices to protect him. Any risk of serious injury or death is unacceptable if there are safer alternatives that are economically and technologically reasonable. Operating together, the care of the manufacturer and the care of the consumer can result in a decrease in injuries. The reasonable care approach to obvious dangers encourages such a result while the no-duty approach creates a disincentive to include safety as an essential element of good design.

While the above analysis focuses on products liability cases, the analysis is valid for all negligence type cases. However, not all courts have adopted this analysis. In *Sherman v. Platte*,¹²⁵ the Supreme Court of Wyoming addressed the viability of the obvious danger rule under comparative fault in the context of a slip and fall case. The court noted that "whenever the danger is obvious or at least as well known to the plaintiff as it is to the defendant landowner, there exists no duty to remove the danger or warn the plaintiff of its existence."¹²⁶ The plaintiff argued that this rule was abrogated by the adoption of comparative fault.¹²⁷ The court, however, stated that "[c]omparative negligence only abrogated absolute defenses involving the plaintiff's own negligence in bringing about his or her injuries. . . . it did not impose any new duties of care on prospective defendants."¹²⁸ Thus, the court concluded that the obvious danger rule remained viable under comparative fault. While this approach

defects were the proximate causes of converting the foreseeable events into a catastrophic accident, and (c) these defects were not due to limitations in the state-of-the-art, i.e., the available technology but were due to the manufacturer's managements reckless disregard for recognized safety or quality control management practices.

Ball, *Product & Institution Liability Prevention, Proceedings of the World Quality Congress* 1-2 (1984).

The report notes that the plaintiff "usually can show that any reasonably competent engineer using Failure Modes and Effects Analysis (FMEA), Fault Tree Hazard Analysis (FTHA) or Job Safety Analysis (JSA) would have foreseen that what did happen could happen." *Id.* at 2. Under Dr. Ball's approach, the reasonable care test extends to management to assure that the proper analysis is performed on the product. For example, management has a duty to require its designers to perform center-of-gravity-height and track-width ratio tests on rollover prone vehicles, and to be sure that advertising does not encourage maneuvers that can result in rollovers. *Id.* at 3. Such a "total management responsibility" approach helps assure that products are not released on the market in unreasonably dangerous conditions. The utilization of an open and obvious danger no-duty rule defeats the goal of having the tort system serve as an accident prevention tool.

¹²⁵642 P.2d 787 (Wyo. 1982).

¹²⁶*Id.* at 789.

¹²⁷*Id.*

¹²⁸*Id.* at 790.

results in the retention of a state's current duty rules, it is questionable whether the retention is desirable when a rule prevents fault comparison and has the unintended consequence of encouraging negligent conduct on the part of defendants. Because of the potential for unintended consequences, Indiana courts considering these issues will want to examine all facets of the problem before deciding whether Indiana will want to retain or set aside its open and obvious danger rule.

2. *The Seat Belt Rule*.—Indiana currently follows the rule that the seat belt defense cannot be used either to prove contributory negligence or to mitigate damages.¹²⁹ The rejection of the seat belt defense has been based on three grounds. First, Indiana courts refuse to impose any duty on an automobile occupant to wear a seat belt.¹³⁰ In *State v. Ingram*,¹³¹ the Indiana Supreme Court stated that “[a]bsent a clear mandate from the legislature to require Indiana automobile riders to wear seat belts, we are not prepared to step into the breach and judicially mandate such conduct.”¹³² The second rationale used by the courts is that the seat belt defense does not fall within the realm of mitigating conduct or avoidable consequences. In *Ingram*, the court stated that the analysis of both of these doctrines is similar, and that both look to “acts of the injured party only after the injury has occurred.”¹³³ Because the seat belt defense deals with conduct of the plaintiff before the accident or injury, it cannot be used to reduce recovery, as it requires plaintiffs to “anticipate negligence and guard against damages which might ensue if such negligence should occur.”¹³⁴ Finally, in *Birdsong v. ITT Continental Baking Co.*,¹³⁵ the court stated that evidence regarding the nonuse of a seat belt was improperly admitted because a reasonable juror could conclude that a reduction of damages was proper based on the proportion of damages attributable to the nonuse. The court noted that such an approach resulted in degrees of negligence being compared, and that Indiana had specifically rejected comparative negligence in earlier decisions.¹³⁶ This decision indicates that some rethinking of the seat belt defense may occur after the Comparative Fault Act takes effect.

a. *The validity of the no-duty rule*.—As previously noted, comparative fault centers on the comparison of a plaintiff's and defendant's negligent conduct.¹³⁷ The effect of a no-duty rule is the avoidance of fault com-

¹²⁹See *State v. Ingram*, 427 N.E.2d 444, 448 (Ind. 1981); *Birdsong v. ITT Continental Baking Co.*, 160 Ind. App. 411, 413, 312 N.E.2d 104, 106 (1974); *Kavanagh v. Butorac*, 140 Ind. App. 139, 155, 221 N.E.2d 824, 831 (1966).

¹³⁰*State v. Ingram*, 427 N.E.2d 444, 448 (Ind. 1981).

¹³¹427 N.E.2d 444 (Ind. 1981).

¹³²*Id.* at 448.

¹³³*Id.*

¹³⁴*Taplin v. Clark*, 6 Kan. App. 2d 66, 67, 626 P.2d 1198, 1200 (citation omitted).

¹³⁵160 Ind. App. 411, 312 N.E.2d 104 (1974).

¹³⁶*Id.* at 413, 312 N.E.2d at 106.

¹³⁷See *supra* text accompanying notes 54-63.

parison where the party's conduct has contributed to his injuries in some manner. Indiana's no-duty rule regarding the use of seat belts illustrates the scope of the problem. The plaintiff's failure to use a seat belt may have contributed to his injuries, but the courts impose no duty to wear the belt and the plaintiff cannot be deemed contributorily negligent. This approach, however, creates conceptual problems under a comparative fault system because the plaintiff's nonuse may have clearly resulted in an increased injury. This problem may be solved by close scrutiny into the purpose and rationale of the seat belt rule to determine whether it is valid under a comparative fault system. A number of jurisdictions have dealt with this issue and Indiana courts will probably turn to these jurisdictions for guidance in addressing the problem.

Comparative fault jurisdictions that have dealt with the seat belt issue have done so by examining the policies behind comparative fault and the seat belt defense. Two recent Florida decisions clearly outline the issues associated with the seat belt defense under a comparative fault system.¹³⁸ In *Lafferty v. Allstate Insurance Co.*,¹³⁹ the Florida Court of Appeals, like Indiana, supported the idea of judicial restraint in this area and noted that the duty to wear a seat belt was properly a duty to be imposed by the legislature, not the courts.¹⁴⁰ In support of this decision, the *Lafferty* court noted that before the seat belt could be used to modify a standard of care, there had to be some consensus as to its utility. Even though statistical studies indicated the utility of the seat belt, society had not yet accepted the seat belt as "a necessary accoutrement of safe driving."¹⁴¹ Thus, the court noted that it would be imposing a new standard of conduct on the public as opposed to enforcing a standard generally accepted by the public.¹⁴² In addition, the tests, studies, and surveys necessary to determine the effectiveness and utility of seat belts were deemed to be within the traditional realm of the legislature rather than the courts.¹⁴³ The court concluded that in light of these factors, Florida courts should not impose a duty on the public to wear seat belts.

The *Lafferty* court then addressed the issue of whether the nonuse of a seat belt could be used to decrease the recovery of a plaintiff. To determine that the nonuse of a seat belt could not be used to reduce damages, the court looked at a number of factors:

¹³⁸*Lafferty v. Allstate Ins. Co.*, 425 So. 2d 1147 (Fla. Dist. Ct. App. 1982); *Insurance Co. of N. Am. v. Pasakarnis*, 425 So. 2d 1141 (Fla. Dist. Ct. App. 1982). Both of the cases certified the following question to the Florida Supreme Court: Should Florida courts consider seat belt evidence as bearing on comparative negligence or mitigation of damages? 425 So. 2d at 1151; 425 So. 2d at 1147.

¹³⁹425 So. 2d 1147 (Fla. Dist. Ct. App. 1982).

¹⁴⁰*Id.* at 1149.

¹⁴¹*Id.* at 1148.

¹⁴²*Id.* at 1149.

¹⁴³*Id.*

(1) plaintiff need not predict the defendant's negligence or anticipate an accident; (2) seat belts are not required in all vehicles, and defendant shouldn't be permitted to take advantage of the fact that they were installed in plaintiff's vehicle; (3) most people don't use seat belts, so a jury shouldn't be permitted to find that they should; and (4) allowing a seat belt defense will produce a "veritable battle of experts" on the causation question, and speculative verdicts.¹⁴⁴

The court also focused on the cause of the accident versus the cause of the injury and noted the possibility of confusing the jury if the nonuse of a seat belt was used to reduce damages.¹⁴⁵

The dissent in *Insurance Company of North America v. Pasakarnis*¹⁴⁶ addressed each of these factors and concluded that the nonuse of a seat belt should be considered.¹⁴⁷ The *Pasakarnis* dissent focused on the cause of the injury as a justification for considering the seat belt defense.¹⁴⁸ The distinction between the cause of injury and the cause of the accident is a subtle but important distinction to make. The significance of such a distinction is best illustrated by an example. Assume the plaintiff is an automobile passenger who fails to use her seat belt. The driver of the car turns a corner, the passenger's door flies open, the passenger falls out of the car and is struck by an oncoming vehicle. In this case, the nonuse of the seat belt was a cause of the accident.¹⁴⁹ The more common accident, however, is one in which the car is struck by another car and the passenger is thrown into the front windshield or dash. In this case, the nonuse of the seat belt had no causal relation to the cause of the accident, but did result in an increase in the damages suffered as a result of the accident. Based on this distinction, the *Pasakarnis* dissent suggested that "like all other negligence issues, the 'seat belt defense' may be submitted only when there is also competent evidence that the failure to use it bore a causal relation to the plaintiff's injuries."¹⁵⁰ Thus, a comparison

¹⁴⁴*Id.* at 1149-50 (quoting *Selfe v. Smith*, 397 So. 2d 348, 351 n.8 (Fla. Dist. Ct. App. 1981)).

¹⁴⁵425 So. 2d at 1150.

¹⁴⁶425 So. 2d 1141, 1142 (Fla. Dist. Ct. App. 1982). It should be noted that the *Pasakarnis* dissent was originally written as the majority opinion. However, after its submission, the *Lafferty* opinion was prepared and won the support of the majority in *Pasakarnis*. Thus, the original *Pasakarnis* majority opinion became the dissent. *Id.* at 1142 n.1.

¹⁴⁷*Id.* at 1147.

¹⁴⁸*Id.* at 1143.

¹⁴⁹*See* *Curry v. Moser*, 89 A.D.2d 1, 454 N.Y.S.2d 311 (1982). This fact situation arose in the *Moser* case. The court determined that because the failure to wear the seat belt actually had a causal relation to the accident, it should be considered by the jury. The court noted that the case was distinguishable from the usual cases where the seat belt would have prevented ejection or "second collision" following a collision with another vehicle or object. *Id.* at 7, 454 N.Y.S.2d at 315.

¹⁵⁰425 So. 2d at 1147 (citations omitted).

of fault would occur whenever the nonuse of a seat belt resulted in causing the plaintiff's injuries.

This approach notes that the failure to wear a seat belt would never be negligence per se, but rather would be an issue for the jury.¹⁵¹ A valid point by the *Lafferty* majority indicates that if such a duty is imposed it should not be dependent upon the circumstances of each case.¹⁵² Either the duty exists or it does not.

Another approach to the problem was suggested by the Supreme Court of Wisconsin in *Foley v. City of West Allis*.¹⁵³ The *Foley* decision noted that a Wisconsin court "was one of the first courts to hold that an automobile occupant has a duty based on the common law standard of ordinary care to use available seat belts."¹⁵⁴ The factors given to support the duty were "the realities of the frequency of automobile accidents and the extensive injuries they cause, the general availability of seat belts, and the public knowledge that riders and drivers should 'buckle up for safety[.]'"¹⁵⁵ Individuals who did not utilize seat belts were deemed to be responsible "for the incremental harm caused by their failure to wear available seat belts."¹⁵⁶ The court concluded that when the failure to wear the seat belt is not a cause of the collision but is a cause of the party's injury, the negligence should not be used to determine fault, but should be used to reduce the amount of recoverable damages.¹⁵⁷ When the nonuse of the seat belt actually contributed to the cause of the accident, as when a person falls out of a car, then the nonuse can be considered to apportion fault. However, a double use probably is not permitted. Rather, the nonuse would be used either to apportion fault or reduce damages, not to do both.¹⁵⁸

b. Restraint laws in Indiana.—These approaches suggest that a number of alternatives are available to Indiana under a comparative fault system. Indiana has one unique factor to consider when addressing this issue. The Indiana legislature recently passed the Child Passenger Restraint Systems Act.¹⁵⁹ This Act creates a duty on parents to strap their children safely

¹⁵¹*Id.* at 1146-47.

¹⁵²425 So. 2d at 1149.

¹⁵³113 Wis. 2d 475, 335 N.W.2d 824 (1983).

¹⁵⁴*Id.* at 483, 335 N.W.2d at 828 (citing *Bentzler v. Braun*, 34 Wis. 2d 362, 149 N.W.2d 626 (1967)).

¹⁵⁵*Id.* (footnotes omitted).

¹⁵⁶*Id.*

¹⁵⁷*Id.* at 478, 335 N.W.2d at 826.

¹⁵⁸*See* *Curry v. Moser*, 89 A.2d 1, 8, 454 N.Y.S.2d 311, 316 (1982).

¹⁵⁹Act of Apr. 15, 1983, Pub. L. No. 141-1983, Sec. 2, §§ 1-9, 1983 Ind. Acts 986-987 (codified at IND. CODE §§ 9-8-13-1 to -9 (Supp. 1984)).

As of July 31, 1983, 41 state legislatures and the District of Columbia had passed legislation requiring the use of child safety seats. It is estimated that child safety seats are 80-90% effective in preventing fatalities and injuries. This is based on studies performed in Washington and Tennessee. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 53 (1983).

into their seats. The statute states, however, that the failure to comply with the law "does not constitute contributory negligence."¹⁶⁰ This section expresses a clear intent on the part of the legislature not to impose civil responsibility for neglecting to perform that duty. It also implies that the legislature has recognized itself as the proper body to deal with the seat belt issue.

The legislature's approach is not necessarily the last word on the seat belt defense in Indiana. The child restraint act was passed under a common law negligence system and must be regarded as a part of that system. The legislature's reluctance to label the nonuse of seat belts as contributory negligence could stem from the harsh results obtained under common law contributory negligence, or the fear that the parent's negligence will be imputed to the innocent child.¹⁶¹ Under a comparative fault system, such a result is no longer mandated as the plaintiff's negligence no longer acts as a complete bar to recovery.

However, for safety devices to achieve the desired results, they must be properly used. See Weber & Melvin, *Injury Potential with Misused Child Restraining Systems*, TWENTY-SEVENTH STAPP CAR CRASH CONFERENCE PROCEEDINGS, p. 134 (1983). The following chart from the National Safety Council indicates the status of child passenger restraint laws as of July 31, 1983.

State	Effective Date	State	Effective Date
Alabama	July 1, 1982	Missouri	Jan. 1, 1984
Arizona	July 1, 1984	Montana	Jan. 1, 1984
Arkansas	Aug. 1, 1983	Nebraska	Aug. 26, 1983
California	Jan. 1, 1983	Nevada	July 1, 1983
Colorado	Jan. 1, 1984	New Hampshire	July 1, 1983
Connecticut	Oct. 1, 1982	New Jersey	Apr. 7, 1983
Delaware	June 2, 1982	New Mexico	June 17, 1983
Dist. of Col.	July 1, 1983	New York	Apr. 1, 1982
Florida	July 1, 1983	North Carolina	July 1, 1982
Georgia	July 1, 1984	North Dakota	Jan. 1, 1984
Hawaii	July 1, 1983	Ohio	Mar. 7, 1983
Illinois	July 1, 1983	Oklahoma	Nov. 1, 1983
Indiana	Jan. 1, 1984	Oregon	Jan. 1, 1984
Kansas	Jan. 1, 1982	Pennsylvania	pending
Kentucky	July 15, 1982	Rhode Island	Apr. 1, 1982
Louisiana	Aug. 29, 1983	South Carolina	July 1, 1984
Maine	Sept. 21, 1983	Tennessee	Jan. 1, 1978
Maryland	Jan. 1, 1984	Virginia	Jan. 1, 1983
Massachusetts	Jan. 1, 1982	Washington	Jan. 1, 1984
Michigan	Apr. 1, 1982	West Virginia	July 10, 1981
Minnesota	Jan. 1, 1982	Wisconsin	Dec. 1, 1982
Mississippi	July 1, 1983		

NATIONAL SAFETY COUNCIL, *Accident Facts 53* (1983) (citing National Transportation Safety Board).

¹⁶⁰IND. CODE § 9-8-13-9 (Supp. 1984).

¹⁶¹The imputation of the parent's negligence on the child could be prevented by other appropriate limitations while still allowing the parent's failure to use the child safety seat to be used for reduction of the parent's recovery.

The enactment of a child safety restraint act illustrates a concern for safety.¹⁶² While the legislature has been reluctant to expand these requirements to adults,¹⁶³ such an expansion may be desirable from a safety standpoint. Safety belts are effective in saving lives or preventing injury fifty to sixty-five per cent of the time.¹⁶⁴ This means that safety belts, if used regularly, could save 12,000 to 16,000 lives annually.¹⁶⁵ One study involving frontal and rollover crashes notes the value of safety belts:

Severe, serious, critical-to-life injuries and fatalities are reduced by the use of belts in both frontal and rollover collisions. In addition, belts increase the occupants [sic] chances of escaping from the crash without injury. In frontal and rollover crashes belts reduce severe-to-fatal head injuries, mostly eliminate neck fatalities, significantly reduce the more severe lower extremity injuries and reduce severe thoracic and abdominal injuries and fatalities.¹⁶⁶

However, the public, as a whole, has been slow to accept and utilize safety belts for a number of reasons, including discomfort and inconvenience.¹⁶⁷ Other factors include beliefs that the risk of accident is slight and safety belts are not effective.¹⁶⁸ Finally, it must be decided whether a fifty to sixty-five percent effectiveness rate justifies the imposition of a duty to wear seat belts.¹⁶⁹

¹⁶²It should be noted that Indiana also has a protective headgear statute which requires a motorcycle driver under the age of 18 and his passengers to wear a helmet, and to carry glasses, goggles, or a face shield. IND. CODE § 9-8-9-3.1 (Supp. 1984).

¹⁶³At one time Indiana required all motorcycle drivers and passengers to wear protective headgear and to carry glasses, goggles, or a face shield. IND. CODE § 9-8-9-3 (1976) (repealed 1977).

This same type of reluctance has apparently carried over into the safety belt area. As of July 31, 1983, no adult safety belt laws were in effect in the United States. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 53 (1983).

¹⁶⁴NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 53 (1983).

¹⁶⁵*Id.*

¹⁶⁶Huelke, Lawson, Scott, & Marsh, *The Effectiveness of Belt Systems in Frontal and Rollover Crashes*, SOCIETY OF AUTOMOTIVE ENGINEERS 8 (1977). See also SOCIETY OF AUTOMOTIVE ENGINEERS, INC., TWENTY-SIXTH STAPP CAR CRASH CONFERENCE p. 113 (1982) (including several tests and studies regarding the use and benefit of safety belts).

¹⁶⁷Agent, Barclay & Deen, *Use of Safety Belts in Kentucky*, DRIVER PERFORMANCE, PASSENGER SAFETY DEVICES, AND THE BICYCLIST 14 (1979).

¹⁶⁸*Id.* at 15.

¹⁶⁹NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 53 (1983). The effectiveness of adult restraint systems must be contrasted with child restraint systems. It is estimated that child restraint systems are 80-90% effective in preventing injuries. *Id.* This higher effectiveness rate may justify the creation of a duty to strap children in the seats while the 50-65% rate for adults may not. It is notable that even with an 80-90% effectiveness rate for accident prevention for children, the Indiana legislature refused to declare the failure to utilize the belts to be contributory negligence. See *supra* note 160 and accompanying text.

Other factors and studies do, however, indicate some benefits from seat belt use that courts and legislatures may consider when dealing with this issue. First, the economic costs associated with motor vehicle injuries rank just behind cancer in estimated direct and indirect costs to the United States. Among the rated costs the rankings were 1) cancer, 2)

It is not clear which approach Indiana will take. Other jurisdictions dealing with this issue have taken varying approaches; some have continued to refuse to consider the nonuse of a seat belt even under a comparative fault system.¹⁷⁰ The potential for impact in this area is great, and both the Indiana courts and legislature should re-evaluate the issue in light of studies establishing the benefits of seat belts.

V. CONCLUSION

As illustrated, the potential impact on legal practices and procedures is great once the Comparative Fault Act takes effect. The degree of this impact is impossible to predict with any certainty. Much will depend on how courts apply the new statute, and how they re-evaluate rules that arose under the common law contributory negligence system. In addition, since the Act does not take effect until 1985, the legislature may still make amendments that expressly or impliedly alter the issues in any of these areas.¹⁷¹

motor vehicle injuries, 3) coronary heart disease, and 4) stroke. INSURANCE INSTITUTE FOR HIGHWAY SAFETY, POLICY OPTIONS FOR REDUCING THE MOTOR VEHICLE CRASH INJURY COST BURDEN 2-3 (1981). Second, benefits from mandatory seat belt use have been reported in other countries. While no state utilizes an adult safety belt law, 28 foreign countries or provinces have established mandatory safety belt laws. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 53 (1983); see also Green, *Canadians Learn to Live with Seat Belts*, 79 TRAFFIC SAFETY 16 (1979). The benefit from such laws is illustrated by statistics from the Australian State of Victoria. Four years after the passage of safety belt legislation; occupant fatalities had decreased by 37% and injuries by 41%, including a 27% decrease in the incidence of spinal injuries. Am. Assoc. for Automotive Medicine, *Motor Vehicle Safety Belt Use: The Physician's Viewpoint* (pamphlet voicing physicians' support for legislative action). Placing a duty to utilize seat belts on automobile occupants will not diminish or replace the manufacturer's duty to design and produce a crashworthy interior. Rather a duty of care will be shared by the manufacturer and occupant. The occupant will have a duty to wear the seat belt, and the manufacturer will have a duty to design and build a crashworthy interior based on the assumption that the safety belt will *not* always be worn. The manufacturer will also have a duty to design and utilize the best safety belt mechanism available. The duty on the manufacturer is justifiable because of the manufacturer's expertise in automobile design and the manufacturer's access to testing facilities. Unlike the manufacturer, the average consumer lacks the expertise and resources required to determine whether a dashboard is safe for impact or a seat belt design is the safest available.

If the seat belt defense becomes available to mitigate damages or determine causation, significant problems may arise at trial. The defendant will try to prove certain injuries were the result of the occupant's failure to use the seat belt, while the plaintiff will try to prove the injuries were the result of the manufacturer's defective design or other negligence. Various experts will attempt to prove these matters, and the jury will have to determine whether damages should be reduced for the failure to wear the seat belt. In these trials, the resources of biomechanical engineering will be greatly needed and challenged.

¹⁷⁰See, e.g., *Lafferty*, 425 So. 2d 1147.

¹⁷¹The Act has already been amended once by the passage of Senate Bill 419. Act of Mar. 5, 1984, Pub. L. No. 174-1984, 1984 Ind. Acts 1468. The present form of the Act does not take effect until January 1, 1985.

In conclusion, the cumulative effect of the statute must be kept in mind. Ideally, the statute will alleviate the harsh "all or nothing" effect of contributory negligence. However, if joint and several liability has been abrogated, plaintiffs may find that more but smaller judgments may be obtained, and fewer collected. This raises the question of what has truly been accomplished by the Act: Has the harsh "all or nothing" approach merely been replaced by meaningless verdicts? If so, who has really benefited? While no answers to these questions currently exist, it is certain that the adoption of comparative fault will alter legal thinking and practice in Indiana.

Comparative Negligence in Indiana: A Unique Statute That Will Reshape the Law

VICTOR E. SCHWARTZ*

I. INTRODUCTION

Indiana has joined the stampede against the common law contributory negligence rule,¹ becoming the thirty-ninth state to adopt some form of comparative negligence either by statute or by case law decision.² As will be detailed in this Article, the statute is unique: it will, over time, totally reshape the law of torts in the state and require attorneys on both sides of the aisle to rethink trial strategies.

This Article will address some of the major issues under Indiana's Comparative Fault Act, including the nature of the statutory definition of "fault"; the legislative efforts to remove strict products liability actions

*Partner, Crowell & Moring, Washington, D.C. Coauthor, Prosser, Wade & Schwartz, CASES AND MATERIALS ON TORTS (7th ed. 1982). Author, COMPARATIVE NEGLIGENCE (1974). Mr. Schwartz was the principal author of the UNIFORM PRODUCT LIABILITY ACT. Mr. Schwartz gratefully acknowledges the assistance of Ms. Evelyn F. Rowe, a recent graduate of the Georgetown University Law Center, in preparing this Article.

¹Act of Apr. 21, 1983, Pub. L. No. 317-1983, 1983 Ind. Acts 1930 (codified at IND. CODE §§ 34-4-33-1 to -8 (Supp. 1984)), *amended by* Act of Mar. 5, 1984, Pub. L. No. 174-1984, 1984 Ind. Acts 1468 (codified at IND. CODE §§ 34-4-33-2, 4, 5, 9, to -13 (Supp. 1984)); *see also* V. SCHWARTZ, COMPARATIVE NEGLIGENCE §1.1 (Supp. 1981).

²*Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); *Goetzman v. Wickern*, 327 N.W.2d 742 (Iowa 1982); *Scott v. Riggs*, 96 N.M. 682, 634 P.2d 1234 (1981); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979); ARK. STAT. ANN. §§ 27-1763 to -1765 (1979); COLO. REV. STAT. §§ 13-21-111, -406 (1973 & Supp. 1983); CONN. GEN. STAT. ANN. § 52-572 h, o (West Supp. 1984); HAWAII REV. STAT. § 663-31 (1976); IDAHO CODE § 6-801 (1979); KAN. STAT. ANN. § 60-258a (1976); LA. CIV. CODE ANN. art. 2323 (West Supp. 1984); ME. REV. STAT. ANN. tit. 14, § 156 (1979); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984-85); MICH. COMP. LAWS ANN. § 600. 2949 (Supp. 1983-84); MINN. STAT. ANN. 604.01 (West Supp. 1984); MISS. CODE ANN. § 11-7-15 (1972); MONT. CODE ANN. § 27-1-702 (1981); NEB. REV. STAT. § 25-1151 (1979); NEV. REV. STAT. § 41.141 (1979); N.H. REV. STAT. ANN. § 507:7-a (1983); N.J. STAT. ANN. §§ 2A:15-5.1 to -5.3 (West Supp. 1983-84); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); N.D. CENT. CODE § 9-10-07 (1975); OHIO REV. CODE ANN. § 2315.19 (Page 1981); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1983-84); OR. REV. STAT. 18.470 (1975); PA. STAT. ANN. tit. 42, § 7102 (Purdon 1982); R.I. GEN. LAWS § 9-20-4 (Supp. 1983); S.D. CODIFIED LAWS ANN. § 20-9-2 (1979); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1984) (*modified by* *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984)); UTAH CODE ANN. § 78-27-37 (1977); VT. STAT. ANN. tit. 12, § 1036 (1973 & Supp. 1983); WASH. REV. CODE ANN. §§ 4.22.005-22.925 (Supp. 1983-84); WIS. STAT. ANN. § 895.045 (West 1983); WYO STAT. § 1-1-109 (1977).

In late 1983, Missouri became the fortieth state to adopt a form of comparative negligence. *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983).

from the scope of the statute; and the effect of the statute on apportionment of fault among multiple tortfeasors. These issues will be developed by comparing Indiana's approach to the approaches of other comparative fault jurisdictions.

II. OVERVIEW OF INDIANA'S COMPARATIVE FAULT ACT

Rather than adopt pure comparative negligence which simply reduces damages based on claimants' fault,³ the Indiana legislature elected a modified form. Damages in Indiana are permitted only if the plaintiff is 50% or less "responsible" for his injuries.⁴ Thus, in some cases contributory negligence will continue to act as a complete bar to recovery. This raises questions as to whether doctrines such as last clear chance, which were meant to modify the harshness of the common law contributory negligence rule, will remain viable. The Act also includes assumption of risk in its scope.

The Indiana statute⁵ is entitled "Comparative Fault." The scope of the statute is controlled by its definition of fault.⁶ The Act originally covered all product liability actions whether based on negligence, strict liability, or breach of warranty and also actions based on abnormally dangerous activities.⁷ The only tort actions that clearly were not covered by the original Act were intentional torts.⁸ However, the scope of Indiana's statute was altered in 1984 by amendments which excluded actions based on strict liability and breach of warranty.⁹

The statute compares the negligence of the plaintiff to that of the defendant unless the plaintiff's "contributory fault is greater than the fault of all persons whose fault *proximately* contributed to claimant's damages."¹⁰ This clause allows a defendant to escape liability or increase the plaintiff's total share of fault by establishing that his conduct was not the "proximate cause" of the plaintiff's damages.

Additionally, a single defendant or group of defendants may be able to reduce their share of the damages if they can shift the blame to someone who is not in the litigation. This "nonparty defense" is permitted under Indiana's comparative fault scheme.¹¹ The Act defines a nonparty

³SCHWARTZ, *supra* note 1, at § 3.2.

⁴IND. CODE §§ 34-4-33-5(a)(2), (b)(2), (3) (Supp. 1984).

⁵IND. CODE §§ 34-4-33-1 to -8 (Supp. 1984).

⁶*Id.* § 34-4-33-2(a).

⁷*Id.*

⁸*Id.*

⁹Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, §2(a), 1984 Ind. Acts 1468, 1468 (codified at IND. CODE § 34-4-33-2(a) (Supp. 1984)).

¹⁰IND. CODE § 34-4-33-4(a) (Supp. 1984) (emphasis added).

¹¹Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2, 1984 Ind. Acts 1468, 1468-69 (codified at IND. CODE § 34-4-33-2 (Supp. 1984)).

as "a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant."¹² The definition of "nonparty" may, however, present some problems. To illustrate, it is unclear whether the definition would encompass, for example, bankrupt parties or parties beyond the reach of the state's jurisdiction. Arguably, such parties may not be "liable to the claimant." In any case, the nonparty defense and other features of the Act will present a whole new series of strategic considerations for both plaintiff and defense counsel.

III. THE NATURE OF INDIANA'S COMPARATIVE FAULT

The Indiana definition of "fault" tracks that found in the Uniform Comparative Fault Act in most respects.¹³ There are some interesting deviations, however; including the omission of the words "in any measure" before "negligent or reckless" as found in the Uniform Act, the addition of "willful" and "wanton" to "negligent or reckless," as well as the addition of specific language excluding intentional torts. There may be some zone at the bottom end of the scale of plaintiff's or defendant's fault where slight fault will not be considered; under the common law contributory negligence system juries tended to do this anyway.¹⁴ The explicit omission of intentional acts may be an attempt to avoid the ambiguity surrounding the comparative fault acts of Maine and Arkansas,¹⁵ which must be closely read to arrive at the conclusion that the legislatures meant to only cover actions where contributory negligence formerly would have been a complete defense.¹⁶ While disavowing application to intentional acts, the statute nonetheless includes "willful" acts or omissions. It seems most likely that by these terms, the legislature intended conduct which is not directly intended to cause harm but is nonetheless so unreasonable and dangerous that the actor knew or should have known it was highly probable that harm would result. This is the equivalent of

¹²*Id.*

¹³The UNIF. COMPARATIVE FAULT ACT § 1(b), 12 U.L.A. 35, 36-37 (Supp. 1984) provides: "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages.

¹⁴SCHWARTZ, *supra* note 1, at § 1.2(B). Juries may ignore instructions when the result under them would seem manifestly unfair. Judges no longer instruct that "even the slightest negligence on the part of the plaintiff will bar his claim." See *Huey v. Milligan*, 242 Ind. 93, 175 N.E.2d 698 (1961).

¹⁵ARK. STAT. ANN. §§ 27-1763 to -1765 (1979); ME. REV. STAT. ANN. tit. 14, § 156 (1979).

¹⁶SCHWARTZ, *supra* note 1, at § 5.2.

"reckless disregard" found in the Restatement and other jurisdictions.¹⁷

At common law and under the Restatement, the contributory negligence defense does not apply when the defendant's conduct rises to the level of "reckless disregard."¹⁸ The courts disallowed the contributory negligence defense because the defendant's conduct was so culpable as to be different in kind from the plaintiff's.¹⁹ The rule also ameliorated the harshness of the contributory negligence rule, a justification which disappears when comparative negligence is adopted.²⁰

Most state courts that have considered the question have generally held that comparative negligence applies to mitigate damages when the defendant's conduct is aggravated, even though the legislature did not address the question.²¹ Thus, the California Supreme Court has suggested that apportionment of liability should occur in all cases involving less than intentional misconduct,²² and several courts have applied comparative negligence to cases of gross or willful and wanton negligence.²³ On the other hand, states have been reluctant to allow apportionment for recklessness.²⁴

Another question to be resolved will be whether punitive damages should still be awarded in cases of willful, wanton, or reckless misconduct. Some have suggested that in light of the advantage comparative negligence gives to a plaintiff, punitive damages should no longer be available upon a showing of "recklessness."²⁵ On the other hand, it can be argued that comparative negligence is really irrelevant to the punitive damages issue: if a plaintiff proved recklessness under the contributory

¹⁷RESTATEMENT (SECOND) OF TORTS § 500 (1965) provides:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

The conduct described in this section of the Restatement is often called "wanton or willful misconduct" in statutes and court opinions.

¹⁸*Id.* §§ 481, 482, 500.

¹⁹W. PROSSER, HANDBOOK OF THE LAW OF TORTS 426 (4th ed. 1971).

²⁰SCHWARTZ, *supra* note 1, at § 5.3.

²¹*Billingsley v. Westrac Co.*, 365 F.2d 619 (8th Cir. 1966) (applying Arkansas law before the comparative fault statute was enacted); *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

²²*Ewing v. Cloverleaf Bowl*, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

²³*E.g.*, *Amoco Pipeline Co. v. Montgomery*, 487 F. Supp. 1268 (W.D. Okla. 1980).

²⁴*E.g.*, *Draney v. Bachman*, 138 N.J. Super. 503, 351 A.2d 409 (1976) (comparative negligence applies in cases of gross negligence but not in cases of willful or wanton negligence; "gross" negligence is merged into ordinary negligence).

²⁵*See, e.g.*, *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962) (punitive damages available only for intentional torts).

negligence rule, his claim would not have been barred. Comparative negligence does not provide an advantage in that precise situation.

The question whether punitive damages should be awarded under a comparative fault system is a significant issue in Indiana. A recently enacted Indiana statute allows punitive damages to be awarded against a defendant when there is criminal liability.²⁶ Therefore, punitive damages can be imposed in drunk driving cases.²⁷ Courts in other states have generally held that the purposes of punitive damages, punishment and deterrence, are so completely outside the theories of compensatory damages that punitive damages may be awarded even when the plaintiff has been negligent.²⁸

IV. THE INTERSECTION WITH THE LAW OF PRODUCT LIABILITY

The Indiana statute originally applied comparative fault to strict liability and breach of warranty actions and included "misuse of a product for which the defendant otherwise would be liable" in its definition of "fault."²⁹ This inclusion of products liability in comparative negligence was consistent with the Uniform Products Liability Act,³⁰ the Uniform Comparative Fault Act,³¹ and some, but not all, of the other states that have adopted comparative negligence.³² However, in the 1984 amendments to Indiana's Comparative Fault Act, actions based on strict liability and breach of warranty were removed from the scope of the Act.³³

²⁶Act of Feb. 29, 1984, Pub. L. No. 172-1984, Sec. 2, § 2, 1984 Ind. Acts 1462, 1462 (codified at IND. CODE § 34-4-34-2 (Supp. 1984)) provides:

It is not a defense to an action for punitive damages that the defendant is subject to criminal prosecution for the act or omission that gave rise to the civil action.

However, a person may not recover both:

(1) punitive damages; and

(2) the amounts provided for under section 1 of this chapter.

²⁷According to IND. CODE § 9-11-2-2 (Supp. 1984), "[a] person who operates a vehicle while intoxicated commits a Class A misdemeanor."

²⁸*Amoco Pipeline Co. v. Montgomery*, 487 F. Supp. 1268 (W.D. Okla. 1980); *Teche Lines v. Pope*, 175 Miss. 393, 166 So. 539 (1936).

²⁹Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 2, 1983 Ind. Acts 1930, 1930 (codified at IND. CODE § 34-4-33-2. (Supp. 1983)); *amended by* Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2, 1984 Ind. Acts 1468, 1468 (codified at IND. CODE § 34-4-33-2 (Supp. 1984)).

³⁰MODEL UNIF. PRODUCTS LIABILITY ACT § 111 (A), 44 Fed. Reg. 62,714, 62,734 (1979) (phrased in terms of "comparative responsibility").

³¹UNIF. COMPARATIVE FAULT ACT § 1(b), 12 U.L.A. 35 (Supp. 1984).

³²*West v. Caterpillar Tractor Co.*, 547 F.2d 885 (5th Cir. 1977) (applying Florida law); *Stueve v. American Honda Motors Co.*, 457 F. Supp. 740 (D. Kan. 1978); *Sun Valley Airlines v. Avco-Lycoming Corp.*, 411 F. Supp. 598 (D. Idaho 1976); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140 (1979); *Black v. General Elec. Co.*, 89 Wis. 2d 195, 278 N.W.2d 224 (1979).

³³Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2, 1984 Ind. Acts 1468, 1468-69 (codified at IND. CODE § 34-4-33-2 (Supp. 1984)).

There are those who have argued that comparative fault does not work in product liability actions,³⁴ but recent court decisions and most commentators have observed that they can work together.³⁵ It has been so in New Hampshire since 1968.³⁶ Moreover, there is a continuing ideological debate over the role of fault in strict product liability actions. Theoretically, strict liability focuses on the defectiveness of the product and not on the manufacturer's conduct.³⁷ Persons who have studied product liability, however, respond that strict liability has never been "strict," at least in the areas of product design and warnings, because almost every court takes into account the actual circumstances at the time of manufacture and incorporates "reasonableness" into its liability standard.³⁸ Thus, one is still comparing fault although the liability base in product design and warranty actions has been mislabeled as strict.³⁹ The 1984 amendments to Indiana's Comparative Fault Act were not a response to the debate over the "strict nature of liability." Instead, the Indiana legislature wanted to preserve the assumption of risk and unforeseeable misuse defenses in strict liability actions.⁴⁰ The net result of the 1984 amendments may be that plaintiffs' lawyers will simply choose between negligence and strict liability theories in order to obtain maximum return in accordance with the facts of the case.

Although the 1984 amendments specifically state that Indiana's comparative fault statute shall not apply in any manner to strict liability actions under the product liability statute,⁴¹ Indiana courts could create their own common law rule of comparative fault in this area. Courts in other states

³⁴See, e.g., Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297 (1977) (suggesting that application of comparative fault in a products case may negate the very reason for deciding that defendant's product is defective).

³⁵SCHWARTZ, *supra* note 1, at § 12.7.

³⁶In 1968, New Hampshire enacted its basic comparative negligence law. N.H. REV. STAT. ANN. § 507:7-a (1983). The statute was applied to assumption of risk in the strict product liability case, *Hagenbuck v. Snap-on Tools Corp.*, 339 F. Supp. 676 (D. N.H. 1972).

³⁷RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused

(2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product

³⁸E.g., Powers, *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777 (1983) ("It is not surprising that courts resolve difficult conceptual problems by relying on the familiar analytical concepts of negligence").

³⁹*Id.* at 780 ("[C]ourts have had difficulty avoiding fault when they have attempted to apportion a loss . . . between a culpable plaintiff and a defendant").

⁴⁰E. Bayliff, *Amendments to the 1983 Comparative Fault Act*, INDIANA'S COMPARATIVE FAULT ACT II-1, 4-5 (Indiana Continuing Legal Education Forum 1984).

⁴¹Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 8, § 13, 1984 Ind. Acts 1468, 1473 (codified at IND. CODE § 34-4-33-13 (Supp. 1984)).

have recently applied comparative negligence and equitable apportionment principles to strict product liability.⁴² In *Duncan v. Cessna Aircraft Co.*,⁴³ for example, the Texas Supreme Court adopted comparative apportionment of fault in a strict liability action against the manufacturer of a light aircraft. In *Duncan*, the defendant-manufacturer sought contribution from the pilot's estate and reduction of the award to the pilot's estate on the ground that the pilot was contributorily negligent. Under previous Texas decisions, contributory negligence was no defense to a Restatement section 402A action, although assumption of risk was a complete defense. The Texas Supreme Court had already adopted comparative negligence in cases of unforeseeable product misuse. The court commented that differing rules for strict liability, negligence, and breach of warranty actions caused procedural difficulties; there was no "qualitative difference" between contributory negligence and recognized strict product liability defenses that would justify the complexity of the existing rules.⁴⁴ These rules also unnecessarily complicated allocation among multiple tortfeasors.⁴⁵ Although the Texas comparative fault statute focused solely on negligence actions, the court adopted comparative apportionment of fault as "a feasible and desirable means of eliminating confusion and achieving efficient loss allocation in strict liability cases."⁴⁶

V. THE INTERFACE AMONG THE 50% RULE, JOINT AND SEVERAL LIABILITY, AND CONTRIBUTION AND INDEMNITY

While most commentators advocate a "pure" system of comparative negligence, one in which the plaintiff can collect something as long as his share of fault falls short of 100%,⁴⁷ some states, including Indiana, have been unwilling to go that far.⁴⁸ Many have adopted the "50% system" adhered to by Indiana, on the ground that it is unjust for a plaintiff to recover when he was more at fault than the defendant.⁴⁹ In fifteen states and the Virgin Islands, the plaintiff must not be more than 50% negligent in order to recover.⁵⁰ In nine states the plaintiff must be

⁴²*Austin v. Raybestos-Manhattan, Inc.*, 471 A.2d 280 (Me. 1984), *Day v. General Motors Corp.*, 345 N.W.2d 349 (N.D. 1984) (applying comparative fault in a "second collision" strict liability case where the plaintiff had fallen asleep at the wheel); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

⁴³665 S.W.2d 414 (Tex. 1984).

⁴⁴*Id.* at 423.

⁴⁵*Id.*

⁴⁶*Id.* at 427.

⁴⁷SCHWARTZ, *supra* note 1, at § 21.3.

⁴⁸*See infra* notes 50-51 and accompanying text.

⁴⁹SCHWARTZ, *supra* note 1, at § 21.3. In actual practice, lopsided comparative verdicts are rare. As one party's fault approaches 100% and the other's approaches zero, causation and the substantial factor rule take over.

⁵⁰CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1984) (not applicable in products

less than 50% at fault or the plaintiff's contributory negligence will act as a complete bar to his recovery.⁵¹

The difference of a percentage point is important. Juries have a tendency to split fault down the middle and return verdicts that the parties were equally at fault.⁵² In states where juries are required to bring in special verdicts on percentage of fault but cannot be instructed on the consequences of a 50% verdict, the jury may be misled by the system and unintentionally leave the plaintiff with nothing.⁵³ For this reason, many states that started with the less than 50% rule have changed their laws to the 50% or less version.⁵⁴

Regardless of where the "vital point" falls, difficult issues arise when the contributory negligence defense remains viable. Doctrines aimed at modifying the harshness of the contributory negligence defense, such as last clear chance, may still be applicable.⁵⁵ Some states with a modified comparative fault system have retained the last clear chance doctrine.⁵⁶ It should be noted that jurisdictions that have retained the rule have not given very broad scope to the doctrine. The rule has been restricted to *conscious* last clear chance, where the defendant knew that the plaintiff was in peril and failed to use reasonable care to avoid the accident.⁵⁷

A consistent system of comparative fault, in addition to adopting pure comparative negligence, would apportion fault among multiple tortfeasors, allow contribution, and abolish joint and several liability. By way of contrast, the Indiana statute bars any right of contribution among tortfeasors

liability cases); IND. CODE § 34-4-33-1 to -8 (Supp. 1984); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984-85); MINN. STAT. ANN. § 604.01 (1) (West Supp. 1984); MONT. CODE ANN. § 27-1-702 (1981); NEV. REV. STAT. § 41.141 (1979); N.H. REV. STAT. ANN. § 507:7-a (1983); N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1983-84); OHIO REV. CODE ANN. § 2315.19 (Page 1981); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1983-84); OR. REV. STAT. § 18.470 (1975); PA. STAT. ANN. tit. 42, § 7102 (Purdon Supp. 1982); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1984); VT. STAT. ANN. tit. 12, § 1036 (1973 & Supp. 1983); V.I. CODE ANN. tit. 5, § 1451 (Supp. 1983); WIS. STAT. ANN. § 895.045 (West 1983).

⁵¹Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979); ARK. STAT. ANN. § 27-1764 (1979); COLO. REV. STAT. § 13-21-111(1) (1973) (not applicable in products liability cases); HAWAII REV. STAT. § 663-31 (1976); IDAHO CODE § 6-801 (1979); KAN. STAT. ANN. § 60-258a (1976); ME. REV. STAT. ANN. tit. 14, § 156 (1979); N.D. CENT. CODE § 9-10-07 (1975); WYO. STAT. § 1-1-109 (1977).

⁵²SCHWARTZ, *supra* note 1, at § 3.5(B).

⁵³*Id.*

⁵⁴*Id.* Massachusetts, Minnesota, Montana, Ohio, Oklahoma, Oregon, Pennsylvania, the Virgin Islands and Wisconsin amended their statutes, rejecting the "less than 50%" rule in favor of the "50% or less" version.

⁵⁵In addition to last clear chance, Indiana common law includes such doctrines as "choice of ways" and "sudden emergency." Vargo, *Comparative Fault: A Need for Reform of Indiana Tort Law*, 11 IND. L. REV. 829, 834 (1978).

⁵⁶SCHWARTZ, *supra* note 1, at § 7.2.

⁵⁷*Id.* §§ 7.1, 7.2.

while allowing actions in indemnity,⁵⁸ and Indiana retains the common law rule of joint and several liability.⁵⁹

The rule against contribution among tortfeasors can have unfair consequences for defendants in a comparative negligence state where joint and several liability is the rule. For example, if the plaintiff were 20% negligent, defendant *A* 15% negligent, and defendant *B* 65% negligent but bankrupt, defendant *A*, though less negligent than the plaintiff, might have to pay 80% of the plaintiff's loss. The Texas statute offers one solution to this problem by making tortfeasors jointly and severally liable if they are more at fault than the plaintiff but proportionally liable if they are less at fault than the plaintiff.⁶⁰

The Arkansas Supreme Court provided an alternative solution to the unfairness which might result when a comparative fault statute is applied in a case involving multiple tortfeasors. The Arkansas Supreme Court adopted the practice of allocating fault proportionally among tortfeasors.⁶¹ The court reasoned that the legislature did not intend to deny recovery to a plaintiff less than half at fault. Yet denial of recovery would result under Arkansas' nonaggregate approach if the most negligent defendants were judgment-proof. Thus, the court concluded that a distribution of the costs of an accident among those who caused it was consistent with legislative intent.⁶²

Three alternatives exist when comparative fault statutes are applied in cases involving multiple tortfeasors. Contribution between tortfeasors is the most equitable alternative. The Texas system, which goes on to limit liability when the defendant's fault is less than the plaintiff's, approaches equity. The Arkansas rule, which seems to comport with results under the Indiana statute, is reasonably fair.

The combination of a 50% rule and multiple defendants can produce unfair consequences for plaintiffs as well. Indiana Code section 34-4-33-4(b) avoids one instance of unfairness by allowing recovery as long as the plaintiff's fault is equal to or less than that of all persons whose fault proximately caused the accident, rather than denying recovery if the plaintiff's fault exceeds that of any one defendant.⁶³

⁵⁸IND. CODE § 34-4-33-7 (Supp. 1984). The bar against contribution is not limited to actions under the statute, as Indiana also bars contribution at common law. *Jackson v. Record*, 211 Ind. 141, 5 N.E.2d 897 (1937); *Hunt v. Lane*, 9 Ind. 248 (1857); *Barker v. Cole*, 396 N.E.2d 964 (Ind. Ct. App. 1979).

⁵⁹*Cooper v. Robert Hall Clothes, Inc.*, 271 Ind. 63, 390 N.E.2d 155 (1979); *Barker v. Cole*, 396 N.E.2d 964 (Ind. Ct. App. 1979).

⁶⁰TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(a)(2)(c) (Vernon Supp. 1984).

⁶¹*Riddell v. Little*, 253 Ark. 686, 488 S.W.2d 34 (1972); *Walton v. Tull*, 234 Ark. 882, 356 S.W.2d 20 (1962).

⁶²253 Ark. at 689, 488 S.W.2d at 36; 234 Ark. at 893, 356 S.W.2d at 26. The Arkansas statute was amended in 1975 to reflect these decisions. ARK. STAT. ANN. § 27-1765 (1979).

⁶³IND. CODE § 34-4-33-4(b) (Supp. 1984).

VI. STRATEGIC CONSIDERATIONS FOR THE ADVOCATE

In Indiana's system, the plaintiff should join as many defendants as possible. Their fault will be considered whether they are in the lawsuit or not.⁶⁴

Under Indiana's modified "50% or less" rule, the plaintiff's attorney faces the danger that his client will leave the courtroom with nothing because the plaintiff's negligence exceeds 50%. Settlement may be more difficult where defendants consider this possibility realistic. If the plaintiff was negligent, his attorney must plan his strategy with the utmost care to show that the defendant was considerably more culpable in regard to the accident than was the plaintiff. In Indiana, a split of liability down the middle is not a total loss but such a jury finding would be considered less than desirable.⁶⁵

To mitigate the effect of the "50% or less" rule, Indiana plaintiffs should strive for the adoption of a judge-made Wisconsin rule. Under the Wisconsin rule, a plaintiff need not be found more at fault than the defendant merely because he was guilty of the same kind of negligence as the defendant.⁶⁶

The defendant's main goal, if he has in fact negligently injured the plaintiff, is to establish the plaintiff's culpability and to use that culpability as a basis for reducing the amount of the award. In arguing to the jury, defense counsel should stress the statutory language providing for reduction of the award when the plaintiff was negligent and impress the jury with the fairness of the comparative negligence principle. The fairness of comparative negligence may cause a jury to apply it more strictly against a plaintiff than the jury would have applied the common law contributory negligence rule.

In Indiana, assumption of the risk is no longer a complete defense, as it is merged into negligence in the statute.⁶⁷ However, it still may be the basis of an effective argument to the jury. Common sense dictates and a jury may be convinced that a plaintiff who has voluntarily and knowingly assumed a known risk is more than half responsible for his injuries. Such an apportionment of fault will push the plaintiff over the vital point barring his recovery.

In multiple tortfeasor cases the defendant faces an interesting tactical problem, especially in view of the Indiana rule that a defendant's fault

⁶⁴IND. CODE § 34-4-33-5(b)(1) (Supp. 1984) ("The jury shall determine the percentage of fault of the claimant, of the defendants, and of any person who is a nonparty.").

⁶⁵Under Indiana's comparative fault statute, a split of liability down the middle would entitle the plaintiff to recover only 50% of the total amount of damages. See IND. CODE § 34-4-33-5(a)(4) (Supp. 1984).

⁶⁶See *Lovese v. Allied Dev. Corp.*, 45 Wis. 2d, 340, 345, 173 N.W.2d 196, 199 (1970); *Taylor v. Western Casualty & Surety Co.*, 270 Wis. 408, 71 N.W.2d 363 (1955).

⁶⁷IND. CODE § 34-4-33-2(a) (Supp. 1984) ("Fault" includes . . . unreasonable assumption of risk not constituting an enforceable express consent . . .").

is to be considered whether he is in the courtroom or not. On the one hand, he wants to place 100% of the blame on others and exonerate himself. On the other hand, the more parties who are considered, the greater the proportion of fault that may be assigned to the defendants as a group. A defendant whose strategy fails may find himself with a small proportion of the fault but end up paying the entire judgment under the joint and several liability rule.⁶⁸ If, however, he is the only tortfeasor whose fault is considered, he may be able to attribute more than half the fault to the plaintiff and escape liability entirely. The best he can do is to avoid consideration of the other defendants' fault unless they are solvent or adequately insured.

Indiana's modified comparative negligence rule gives the defense a sledgehammer, since it is much easier for the defendant to escape liability under a modified system than under a pure system. At the same time, even if the defendant has been more than half at fault, the defense may be able to cut its losses by arguing for a 50-50 apportionment of fault. In complex accident cases, equal apportionment is often a very comfortable position for the trier of fact, much easier than trying to arrive at a precise percentage. In Indiana the plaintiff may still recover half his damages,⁶⁹ but if the defendant was clearly negligent, that result is not so bad, especially if the defendant is counterclaiming for his own damages.

Defense attorneys should strive for the adoption of the seat belt defense, which has previously been rejected in Indiana as a form of comparative negligence.⁷⁰ The comparative fault statute wipes out this line of reasoning, and adoption of the defense would have the beneficial result of encouraging voluntary seat belt use.

VII. CONCLUSION

The new Indiana law of comparative fault will have a major impact on the law of torts in the state. At the same time, one may characterize it by saying that half a loaf is better than none at all. The 50% rule, preservation of joint and several liability, and the rule against contribution still offer the potential for unfair or lopsided results.

The Act will also present a whole new series of strategic considerations for both plaintiff and defense counsel. Strategies that were appropriate under the old contributory negligence defense may backfire.

⁶⁸See, e.g., *Cooper v. Robert Hall Clothes, Inc.*, 271 Ind. 63, 65, 390 N.E.2d 155, 157 (1979) ("Joint tort-feasors constitute, in a sense, one entity, each of them being jointly and severally liable for injury to the plaintiff.').

⁶⁹IND. CODE § 34-4-33-5(a)(4) (Supp. 1984).

⁷⁰*Birdsong v. ITT Continental Baking Co.*, 160 Ind. App. 411, 312 N.E.2d 104 (1974) (reduction in damages because of a motorist's failure to have his seat belt fastened at the time of a collision was improper, as Indiana courts had refuted the doctrine of comparative negligence). *Birdsong* is discussed in Vargo, *Comparative Fault: A Need for Reform of Indiana Tort Law*, 11 IND. L. REV. 831, 841 (1978).

Counsel must be careful to think through strategies in light of the rule including defendants not before the court in the fault calculation. Perhaps most importantly, subsequent judicial interpretation of the Act will lead to new and interesting twists in the field of comparative negligence.

Fairness: A Comparative Analysis of the Indiana and Uniform Comparative Fault Acts

DAVID RANDOLPH SMITH*

JOHN W. WADE**

Just action [is] fairness in distribution . . . the just . . . is the proportional, and the unjust is what violates the proportion.

—Aristotle¹

With the adoption of comparative fault by the 103rd Indiana General Assembly,² Indiana became the fortieth state to abandon the common law rule of contributory negligence in favor of some form of comparative negligence or fault.³ While the Indiana Comparative Fault Act (Indiana

*Assistant Professor of Law, Vanderbilt University. B.A., Harvard University, 1975; J.D., University of Texas, 1978.

**Dean and Distinguished Professor of Law, Emeritus, Vanderbilt University. B.A., University of Mississippi, 1932; J.D., 1934; LL.M., Harvard University, 1935; S.J.D., 1942.

¹ARISTOTLE, NICHOMACHEAN ETHICS 118, 120 (M. Ostwald trans. 1962).

²Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, 1983 Ind. Acts 1930 (codified at IND. CODE §§ 34-4-33-1 to -8 (Supp. 1984)). The Act was amended by Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, 1984 Ind. Acts 1468 (codified at IND. CODE §§ 34-4-33-1 to -13 (Supp. 1984)) [hereinafter cited as Act of Mar. 5, 1984].

³After passage of the Indiana Act, the Missouri Supreme Court, in *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983), judicially adopted pure comparative fault in accordance with the UNIF. COMPARATIVE FAULT ACT §§ 1-6, 12 U.L.A. 57 (West Supp. 1983), bringing the current number of states to have adopted comparative negligence or fault to forty-four. Thirty-four states, Puerto Rico, and the Virgin Islands have adopted comparative negligence or fault by statute: ARIZ. REV. STAT. ANN. § 12-2505 to -2509 (Supp. 1984); ARK. STAT. ANN. §§ 27-1763 to -1765 (Supp. 1983); COLO. REV. STAT. § 13-21-111 (1973 & Supp. 1983); DEL. CODE ANN. § 10-8132 (Supp. 1984); HAWAII REV. STAT. § 663-31 (Supp. 1983); IDAHO CODE §§ 6-801 to -806 (Supp. 1983); IND. CODE §§ 34-4-33-1 to -8 (Supp. 1983), amended by Act of Mar. 5, 1984, *supra* note 2, at IND. CODE §§ 34-4-33-1 to -13 (Supp. 1984); KAN. STAT. ANN. § 60-258a, 2586 (1976); LA. CIV. CODE ANN. art. 2323 (West Supp. 1984); ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1983-84); MASS. ANN. LAWS ch. 231, § 85 (Michie/Law. Coop. Supp. 1983-84); MINN. STAT. § 604.01-.02 (Supp. 1984); MISS. CODE ANN. §§ 11-7-15 (Supp. 1983); MONT. CODE ANN. §§ 27-1-702, -703 (1981); NEB. REV. STAT. § 25-1151 (1979); NEV. REV. STAT. § 41, 141 (Supp. 1981); N.H. REV. STAT. ANN. § 507; 7-a (Supp. 1983); N.J. REV. STAT. §§ 2A:15-5.1 to 5.3 (Supp. 1983-84); N.Y. CIV. PRAC. LAW § 1411 (McKinney Supp. 1983-84); N.D. CENT. CODE § 9-10-07 (Supp. 1983); OHIO REV. CODE ANN. § 2315.19 (Page Supp. 1983); OKLA. STAT. ANN. tit. 23, §§ 13-14 (West

Act) straightforwardly modifies the harsh all-or-nothing effect of contributory negligence,⁴ its provisions produce unfairness and engender a host of unresolved problems. This Article addresses the complexities created by the Indiana Act and suggests modifications and interpretations consistent with the principle of proportionate responsibility embodied in the Uniform Comparative Fault Act (Uniform Act).⁵ Fairness requires not only that the liability of defendants be determined according to the extent of their fault, but also that all parties to the action, defendants and plaintiffs alike, bear the burden of uncollectibility associated with an insolvent or absent party in proportion to their respective shares of fault.

I. OVERVIEW

The interplay among four significant features of the Indiana Act creates inequity and many problems. The Act: (1) adopts a modified form of comparative fault; (2) requires litigating the fault of nonparties; (3) abolishes joint and several liability in favor of proportionate individual liability; and (4) does not apply to actions founded upon strict liability, products liability, or breach of warranty.

The first important facet of the Indiana Act concerns the legislature's choice of modified comparative fault. There are several forms of comparative fault from which to choose: (1) the slight-gross form (recovery only if plaintiff's fault was slight in comparison with defendant's); (2)

Supp. 1982-83); OR. REV. STAT. § 18-470 (1981); PA. STAT. ANN. tit. 42, § 7102 (Purdon Supp. 1983-84); P.R. LAWS ANN. tit. 31, § 5141 (Supp. 1982); R.I. GEN. LAWS § 9-20-4-4.1 (Supp. 1983); S.D. CODIFIED LAWS ANN. § 20-9-2 (Supp. 1983); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1982-83); UTAH CODE ANN. §§ 78-27-37 to -43 (Supp. 1983); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1983); V.I. CODE ANN. tit. 5, § 1451 (Supp. 1983); WASH. REV. CODE ANN. §§ 4.22.005-.920 (Supp. 1984-85); WIS. STAT ANN. § 895-045 (West Supp. 1983-84); WYO. STAT. § 1-1-109 (Supp. 1983).

Ten states have judicially adopted comparative negligence or fault: *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); *Goetzman v. Wichern*, 327 N.W.2d 742 (Iowa 1982); *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984); *Kirby v. Larson*, 400 Mich. 585, 256 N.W.2d 400 (1977); *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983); *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979).

Comparative negligence is the rule in several common law countries—e.g., Ireland, Canadian provinces, Australian states, Great Britain, and New Zealand. UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 35, 36 prefatory note (West Supp. 1984). See J. FLEMING, *THE LAW OF TORTS* at 241-60 (6th ed. 1983). It also governs actions brought under the Jones Act, Federal Employer's Liability Act (FELA), and the admiralty and maritime jurisdiction of the federal courts. See Wade, *Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299, 301-02 (1980).

⁴The statute allows a claimant at fault to recover if the claimant's fault is not greater than the fault of all persons whose fault contributed to plaintiff's damages. IND. CODE § 34-4-33-4 (Supp. 1984).

⁵UNIF. COMPARATIVE FAULT ACT, *supra* note 3.

the even-division form (dividing the damages evenly, or pro rata among the parties); (3) one of the two modified forms (plaintiff can recover reduced damages if plaintiff's fault was either (a) "not as great as" or (b) "not greater than" that of the defendant); and (4) the "pure" form (diminished recovery allowed even though plaintiff's negligence is greater than that of the defendant).⁶ Under the Indiana Act a claimant at fault recovers reduced damages if the claimant's fault is not greater than the fault of all other tortfeasors.⁷ The legislature's choice of the not-greater-than modified form of comparative fault contravenes a distinct trend in favor of the "pure" form of comparative negligence or fault.⁸ Courts and commentators strongly prefer the pure form and rightly so.⁹

The second significant aspect of the Indiana Act is that it requires litigating the fault of nonparties, with the apparent exception of a claimant's employer.¹⁰ In assessing whether a claimant's fault is greater than the fault of all other tortfeasors the Indiana Act considers the fault of "all persons whose fault proximately contributed to the claimant's damages."¹¹ Although including the fault percentages of nonparty tortfeasors to decide whether the claimant's fault is not greater than the fault of all tortfeasors appears to benefit plaintiffs,¹² just the opposite is true.

After the factfinder apportions fault among all tortfeasors, including "nonparties,"¹³ the third feature of the Act comes into play. Each party-defendant is liable to the plaintiff for that defendant's proportionate share

⁶See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* §§ 1.3-1.5 (Supp. 1981); H. WOODS, *COMPARATIVE FAULT* §§ 4.1-4.5 (Supp. 1983).

⁷IND. CODE § 34-4-33-4 (Supp. 1984).

⁸See Wade, *supra* note 3, at 304. Since 1979 four jurisdictions have judicially adopted pure comparative negligence: *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886; *Goetzman v. Wichern*, 327 N.W.2d 742 (Iowa 1982); *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983); *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981).

⁹Of the nine states to adopt comparative negligence judicially, only West Virginia chose not to adopt pure comparative negligence. For a discussion of the advantages of pure comparative negligence and the serious disadvantages of the modified forms, see Fleming, *Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239 (1976); Wade, *The Uniform Comparative Fault Act*, 14 FORUM 379, 385-86 (1979); UNIF. COMPARATIVE FAULT ACT, *supra*, note 3, prefatory note.

¹⁰See *infra* note 13.

¹¹IND. CODE § 34-4-33-4 (Supp. 1984). The decision to include nonparties is unfortunate. See *infra* text accompanying notes 50-76.

¹²The greater number of persons whose fault is considered, the smaller the percentages of fault will be for each person, making it less probable that the plaintiff's fault will be greater than the fault of all tortfeasors. UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 2 comment; McNichols, *The Complexities of Oklahoma's Proportionate Several Liability Doctrine of Comparative Negligence—Is Products Liability Next?*, 35 OKLA. L. REV. 195, 211 (1982).

¹³In apportioning fault, the Indiana Act requires that the factfinder determine the percentage of fault of the claimant, of the defendant, and of any person who is a nonparty. IND. CODE § 34-4-33-5(a). The term "nonparty," as defined in section 2(a), expressly ex-

of the plaintiff's damages and no more.¹⁴ The Indiana Act thus abolishes the principle of joint and several liability by substituting a rule of proportionate individual liability.¹⁵

The fourth distinctive aspect of the Indiana Act is the definition of fault. As originally enacted, the Act included strict tort liability suits and breach of warranty actions involving physical harm to persons or property.¹⁶ In 1984 the legislature amended the Act to delete strict tort liability and breach of warranty actions and also excised product misuse from the Act's definition of fault.¹⁷

cludes the employer of the claimant. Section 5(a), in conjunction with the exclusion of a claimant's employer from the definition of "nonparty" in section 2(a), directly conflicts with the language of sections 4(a) and (b) which state that the claimant "is barred from recovery if his contributory fault is greater than the fault of all *persons* whose fault proximately contributed to the claimant's damages." (emphasis added). Plainly, section 4 requires that the factfinder compare the claimant's fault to the fault of all persons who are tortfeasors in order to determine the claimant's share of total fault. Presumably, "persons" as used in section 4 includes the employer of the claimant. Section 4 does not use the exclusionary "nonparty" term. One could argue that the statute adopts a hybrid approach to fault comparison and allocation by comparing the claimant's fault to that of all tortfeasors (including a claimant's employer) to determine the plaintiff's total share of fault and whether the plaintiff is barred from recovery, and then apportioning fault among only the claimant, defendants, and "nonparties" (excluding the claimant's employer). The problem with this hybrid approach is that section 5(a) makes no provision for, and may indeed bar, determining an employer's share of fault. In imperative terms, section 5 limits fault allocation to the claimant, the defendant, and any "person who is a nonparty."

A claimant's employer, however, is not a nonparty by virtue of section 2(a). The conflict between section 4 and section 5(a) arises from the discrepant use of the terms "persons" in section 4 and "nonparty" in section 5(a). If the Indiana legislature intended that courts employ a hybrid approach to fault comparison and allocation, section 5(a) should be amended to permit the factfinder to determine the employer's share of fault for the limited purpose of total fault comparison in accordance with section 4. Alternatively, section 4 could be amended to provide that the claimant is barred only if the claimant's fault is greater than the total fault of the defendant(s) and all nonparties. Under Indiana's modified (50%) system of comparative fault, this approach to fault comparison can result in barring claims which could otherwise have been maintained if the employer's fault were considered. See *infra* notes 35, 52 and accompanying text.

¹⁴IND. CODE § 34-4-33-5 (Supp. 1984).

¹⁵*Id.* § -5(a)(4), (b)(4). Under the common law rule of joint and several liability each tortfeasor is responsible for the plaintiff's entire injury and the plaintiff may sue each tortfeasor separately or may join any or all of them in one action. See *infra* note 18. Under several liability each tortfeasor is responsible for the plaintiff's entire injury; however, the plaintiff must sue each tortfeasor individually. F. HARPER & F. JAMES, *THE LAW OF TORTS* § 10.1 (1956); W. PROSSER, *LAW OF TORTS* 296 (4th ed. 1971). The term "proportionate individual liability" as used in this Article refers to the imposition of liability on each defendant for only that individual defendant's percentage of the plaintiff's damages (e.g., a defendant found 30% at fault would pay 30% of the plaintiff's damages and no more). Although the Indiana Act does not expressly refer to joint and several liability, by imposing upon each defendant liability only for that defendant's percentage of the plaintiff's damages the Indiana Act fully abrogates joint and several liability.

¹⁶IND. CODE § 34-4-33-2(a) (Supp. 1984).

¹⁷Act of Mar. 5, 1984, *supra* note 2, IND. CODE § 34-4-33-2(a) (Supp. 1984).

Hypothetical situations illustrate some of the questions raised by the Indiana Act. Suppose *P* suffers \$10,000 in damages as a direct result of an intersectional collision between two automobiles driven by *A* and *B*. Assume *P* acted without fault and that *B* is a hit-and-run driver whose identity cannot be determined. Does the Indiana Act apply at all since *P* was not at fault? If the factfinder apportions fault between *A* and *B* at, for example, 30% and 70% respectively, does *P* recover from *A* only \$3,000? If *P* is negligent and fault is apportioned to *P* at 10%, *A* 30%, and 60% to *B*, does *P* bear the full risk of *B*'s absence and recover only \$3,000 even though *A* is three times more at fault than *P*? What result if *B* is insolvent, immune, or not subject to jurisdiction in Indiana? What happens if *A* files a counterclaim and seeks a set-off? How does comparative fault under the Indiana Act affect settlements, contribution, indemnity, last clear chance, imputed negligence, punitive damages, worker's compensation, the basis for comparing fault, multiple actions, joinder of parties, and burdens of proof? Resolution of these questions requires an understanding of the provisions of the Indiana Act and an appreciation of the intricacies inherent in any system of comparative fault.

A. Abolition of Joint and Several Liability

When two or more persons negligently act, either (1) in concert or (2) independently but causing indivisible harm, the common law rule of joint and several liability holds each joint tortfeasor responsible for the plaintiff's entire injury.¹⁸ Under the contributory negligence rule only non-negligent plaintiffs may recover and no means exist to apportion fault or losses. The factfinder's responsibility of apportioning damages under comparative negligence has resulted in a reevaluation of the rule of joint and several liability.¹⁹

Taking the view that the effect of a rule of joint and several liability is unfair and inconsistent with the principle of liability in proportion to fault,²⁰ several jurisdictions,²¹ Indiana now included, have abolished or

¹⁸W. PROSSER, LAW OF TORTS 291-99, 314-17 (4th ed. 1971).

¹⁹See, e.g., Miller, *Extending the Fairness Principle of Li and American Motorcycle: Adoption of the Uniform Comparative Fault Act*, 14 PAC. L.J. 835 (1983); Pearson, *Apportionment of Losses Under Comparative Negligence—An Analysis of Alternatives*, 40 LA. L. REV. 343 at 361-69 (1980); Zavos, *Comparative Fault and the Insolvent Defendant: A Critique and Amplification of American Motorcycle Ass'n v. Superior Court*, 14 LOY. L.A.L. REV. 775 (1981-82).

²⁰For example, if plaintiff is found 10% at fault, defendant *A* 1% at fault and non-party *B* 89% at fault, *A* must pay 90% of the plaintiff's damages under the rule of joint and several liability if *B*, for some reason cannot be brought into court or cannot pay. See, e.g., *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

²¹See, e.g., *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 608, 578

restricted joint and several liability.²² Most states, however, retain the doctrine²³ and alleviate the perceived unfairness by providing for contribution among joint tortfeasors—either on a pro rata basis or on the basis of the relative fault of the parties.²⁴ The Uniform Act provides for joint and several liability and gives defendants a right of contribution in proportion to degrees of fault.²⁵ At stake, in the decision to maintain or abolish joint and several liability is an all-or-nothing choice of who should bear the burden of uncollectibility of damages when a tortfeasor is insolvent, immune, unknown, beyond the reach of process, released, or otherwise incapable of paying the tortfeasor's fair share of damages.²⁶ States

P.2d 899, 918, 146 Cal. Rptr. 182, 201 (1978) (Clark, J., dissenting); *Li v. Yellow Cab Co.*, 13 Cal. 2d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

²²Indiana's abrogation of joint and several liability in favor of proportionate individual liability is described at *supra* notes 14-15 and accompanying text. The comparative negligence statutes of Kansas, Ohio, Vermont, and New Hampshire also provide for proportionate individual liability. KAN. STAT. ANN. § 60-258a(d) (1976); N.H. REV. STAT. ANN. § 507:7-a (Supp. 1983); OHIO REV. CODE § 2315.19(A)(2) (Page Supp. 1983); VT. STAT. ANN. tit. 12 § 1036 (Supp. 1983). Nevada formerly provided for proportionate individual liability but recently amended its statute to require joint and several liability except as to a defendant who is less negligent than the plaintiff. NEV. REV. STAT. § 41.141(3) (Supp. 1981) (as amended 1979).

Oklahoma has abolished joint and several liability in favor of proportionate individual liability in cases in which the plaintiff is negligent, but applies joint and several liability if the plaintiff is not at fault. *Laubach v. Morgan*, 588 P.2d 1071 (Okla. 1981); *Paul v. N.L. Industries, Inc.*, 624 P.2d 68 (Okla. 1981). Minnesota formerly applied proportionate individual liability to negligent plaintiffs, and joint and several liability in the case of fault-free plaintiffs, but in 1980 the Minnesota Supreme Court returned to a general application of joint and several liability. *Kowalske v. Armour & Co.*, 300 Minn. 301, 320 N.W.2d 268 (1974), *overruled*, *Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746 (Minn. 1980). New Mexico has judicially abolished joint and several liability and did so in a case in which the plaintiff was free from fault. *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (N.M. Ct. App. 1981), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

Louisiana, Texas, Oregon, and Nevada have partially abolished joint and several liability by making each defendant liable only for that defendant's share if the defendant's fault is less than the plaintiff's share of fault. LA. CIV. CODE ANN. art. 2324 (West Supp. 1984); NEV. REV. STAT. § 41.141(3) (Supp. 1981); OR. REV. STAT. § 18.485 (1981); TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(c) (Vernon Supp. 1982-83).

Some commentators have argued that calculating shares of fault with reference only to those before the court also constitutes a partial abolition of joint and several liability. See Pearson, *supra* note 19 at 36, 43 & n.94.

²³See, e.g., *Coney v. J.L.G. Industries, Inc.*, 97 Ill. 2d 104, 454 N.E.2d 197 (1983); *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); McNichols, *supra* note 12, at 202-03 & n.20.

²⁴RESTATEMENT (SECOND) OF TORTS § 886A (1977).

²⁵UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 4.

²⁶*Compare* Rozevink v. Faris, 342 N.W.2d 845, 850 (Iowa 1983) ("Were we to modify or eliminate joint and several liability . . . the burden of the insolvent defendant would fall entirely on the plaintiff."); and *Coney v. J.L.G. Industries, Inc.*, 97 Ill. 2d 104, 454 N.E.2d 197 (1983) ("Were we to eliminate joint and several liability as the defendant advocates, the burden of the insolvent or immune defendant would fall on the plaintiff; in

abolishing joint and several liability have placed the entire burden of non-collection on the plaintiff.²⁷ In joint-and-several-liability jurisdictions, defendants are saddled with the entire risk, although typically defendants have a right to seek contribution among themselves.²⁸ Neither approach generates fairness or proportions liability according to fault. Each is unfair to someone.

Plaintiffs and defendants should share the burden of uncollectibility in proportion to their fault.²⁹ The decision to maintain or abolish joint and several liability does not require that either the plaintiff or the defendant must be responsible for the entire damages attributable to absent tortfeasors and insolvent parties. The Uniform Act attempts to provide fair loss allocation among parties to the suit in two ways. First, in apportioning fault, only the fault of parties to the action is considered,³⁰ except in the case of a release or settlement.³¹ By limiting the fault inquiry to parties to the action, the Uniform Act proportionally spreads the burden of uncollectibility of a nonparty's share of fault between the parties.³² This affords an equitable apportionment of nonparty fault without the serious disadvantages of including nonparties.³³

Unfortunately, loss allocation by leaving nonparties out of the fault apportionment process contravenes the provisions of the Indiana Act, which requires determination of the fault of all persons whose fault proximately caused the losses.³⁴ In addition, modified comparative negligence is not suited to the Uniform Act's parties-only approach to fault allocation because ignoring the fault of nonparties can result in barring claims that would not be precluded under pure comparative negligence.³⁵

that circumstance, plaintiff's damages would be reduced beyond the percentage of fault attributable to him.") with *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (N.M. Ct. App. 1981), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (N.M. 1982) (placing full burden of noncollection on the plaintiff).

²⁷See, e.g., *Brown v. Keil*, 224 Kan. 195, 580 P.2d 867 (1978); *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (N.M. Ct. App. 1981), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (N.M. 1982); *Laubach v. Morgan*, 588 P.2d 1071 (Okla. 1981).

²⁸See, e.g., *Criterion Ins. Co. v. Latiala*, 658 P.2d 112 (Alaska 1983); *Woods v. Withrow*, 413 So. 2d 1179 (Fla. 1982); *Coney v. J.L.G. Industries, Inc.*, 97 Ill. 2d 104, 454 N.E.2d 197 (1983).

²⁹See *Fleming*, *supra* note 9; *Miller*, *supra* note 19; *Zavos*, *supra* note 19.

³⁰UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 2(a) and accompanying comment.

³¹*Id.* at § 6; see *infra* text accompanying notes 87-90.

³²UNIF. COMPARATIVE FAULT ACT, *supra*, note 3, at § 6 comment. In the hit-and-run driver example set forth at *supra* note 17, if the factfinder considers only the fault of parties to the action the plaintiff should recover 75% of the total damages from defendant A if ignoring B's fault does not change the relative fault proportion.

³³For a discussion of the effect of including nonparties, see *infra* text accompanying notes 50-76.

³⁴See *supra* note 11.

³⁵In theory, a modified-fault system could adopt a hybrid approach to allocation and compare the plaintiff's fault to that of all tortfeasors to determine the plaintiff's share

The second way that the Uniform Act obtains fair loss allocation arises in the case of an insolvent party-tortfeasor. The Uniform Act allocates the burden of noncollection among all parties at fault (including the plaintiff) by providing for a reallocation of fault percentages.³⁶ Reallocation promotes candor and fairness at trial by removing the incentive to exaggerate the insolvent party's share of liability which is an inherent flaw in the all-or-nothing approaches to joint and several liability.³⁷

The Uniform Act, with its pure form of comparative fault and procedures for allocating the fault of nonparty tortfeasors and insolvent parties, achieves fairness with simplicity. Failing adoption of the Uniform Act, fair risk apportionment under modified comparative fault mandates "full loss allocation"—proportional allocation of the fault of absent tortfeasors and insolvent parties among all litigants according to the Uniform Act's procedure in the case of an insolvent tortfeasor.³⁸

B. *The Fault-Free Plaintiff*

If the plaintiff acts without fault or does not contribute to the injuries or losses, does the Indiana Act apply to reduce the plaintiff's recovery when the tortfeasor is absent or insolvent? This problem does not arise under the Uniform Act because the fault of absent parties is not considered at all; and in the case of an insolvent party, fault-free plaintiffs (being 0% at fault) suffer no reduction in damages when the burden of insolvency is reallocated in proportion to fault. The Indiana Act is silent on the question of whether the Act encompasses cases involving fault-free plaintiffs. Because the statute abolishes joint and several liability³⁹ and carries forward the Indiana rule against contribution among

of total fault, and then apportion fault among only the parties to the suit. A converse hybrid approach would compare the plaintiff's fault to all parties in the action and then apportion fault for damages purposes among all potential tortfeasors. No modified comparative fault jurisdiction has adopted either of these hybrid approaches.

³⁶UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 2(d). This section provides for reallocation as late as one year after judgment. For example, if in the hypothetical in the text following *supra* note 17, *B* were sued as a party defendant, but *B*'s 60% share of fault was uncollectible due to insolvency, the \$6,000 representing *B*'s "equitable share of the obligation" would be reallocated between the plaintiff and defendant *A*. Plaintiff's equitable share would increase by \$1,500 (1/4 of \$6,000) and *A*'s equitable share would increase by \$4,500 (3/4 of \$6,000) because plaintiff and *A* were 10% and 30% at fault respectively.

³⁷Under joint and several liability plaintiffs will have an incentive to exaggerate an insolvent defendant's liability since defendants bear the risk of noncollection. Under proportionate individual liability, absent reallocation, defendants have the incentive to exaggerate the insolvent tortfeasor's fault because the plaintiff must bear the risk. *See infra* text accompanying notes 58-61.

³⁸Because the Indiana Act includes nonparties in apportioning fault, reallocation should distribute uncollectible shares of damages for nonparties as well as insolvent parties in the manner illustrated at *supra* note 36. *See infra* text accompanying notes 62-72.

³⁹*See supra* note 15 and accompanying text.

tortfeasors,⁴⁰ the answer to this question is important both to plaintiffs and defendants.

Courts should not employ a comparative fault act that abrogates joint and several liability to reduce the plaintiff's recovery if the plaintiff is not at fault. Applying the statute under these circumstances would make a fault-free plaintiff worse off under comparative fault than under contributory negligence.⁴¹ Strict adherence to the loss apportionment principles of comparative fault appears to call for applying the Indiana Act's apportionment of damages and proportionate individual liability rules to a fault-free plaintiff.⁴² However, fairness and the policies underlying joint and several liability, strongly militate in favor of limiting the proportionate individual liability effects of the comparative fault statute to blameworthy plaintiffs.⁴³ When the choice is between an innocent plaintiff and at-fault defendants, the parties at fault should pay the damages attributable to the fault of absent or insolvent parties.⁴⁴

The proportionate individual liability jurisdictions that have judicially considered the fault-free plaintiff issue have reached divergent results. In *Boyles v. Oklahoma Natural Gas Co.*,⁴⁵ the Oklahoma Supreme Court, in holding that joint and several liability principles govern a fault-free plaintiff's negligence action, noted that Oklahoma's proportionate individual liability rule did "not apply to tort litigation in which the injured party is not a negligent coactor."⁴⁶ In addition, comparative negligence statutes in Ohio, Vermont, and New Hampshire appear to abolish joint and several liability only when the plaintiff is negligent.⁴⁷ Courts in New Mexico⁴⁸ and Kansas,⁴⁹ however, apply the proportionate

⁴⁰IND. CODE § 34-4-33-7 (Supp. 1984).

⁴¹See Pearson, *supra* note 19, at 366.

⁴²*Id.*; McNichols, *supra* note 12, at 204.

⁴³See, e.g., *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 608, 578 P.2d 899, 918, 146 Cal. Rptr. 182, 201 (1978) (Clark, J., dissenting); *Paradise Valley Hosp. v. Schlossman*, 143 Cal. App. 3d 87, 191 Cal. Rptr. 531 (Cal. Ct. App. 1983); Fleming, *supra* note 9.

⁴⁴Fleming, *supra* note 9.

⁴⁵619 P.2d 613 (Okla. 1981).

⁴⁶*Id.* at 617. *Cf.* *Coney v. J. L. G. Industries*, 97 Ill. 2d 104, 454 N.E.2d 197 (1983) (court noted that if joint and several liability were abolished in comparative negligence actions, the joint and several liability rule would still prevail if the plaintiff were free from fault).

⁴⁷N.H. REV. STAT. ANN. § 507:7-a (Supp. 1983); OHIO REV. CODE ANN. § 2315.19 (Page Supp. 1983); Vt. Stat. Ann. tit. 12, § 103 (Supp. 1983) (discussed in McNichols, *supra* note 12, at 207). In joint and several liability jurisdictions, when the plaintiff is free from fault, apportionment of fault between defendants occurs if tortfeasors have a right of contribution or equitable indemnity based upon comparative fault. See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE*, §§ 16.7-16.9 (Supp. 1981); H. WOODS, *COMPARATIVE FAULT* § 13.6 (1978).

⁴⁸See *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (N.M. Ct. App. 1981), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (N.M. 1982).

⁴⁹See *Lester v. Magic Chef, Inc.*, 641 P.2d 353 (Kan. 1982); *Brown v. Keil*, 224 Kan. 195, 580 P.2d 867 (1978).

individual liability rule even when the jury returns a verdict finding the plaintiff free from contributory fault.

A provision that the statute would not work to reduce a plaintiff's recovery, when no fault of the claimant was argued or found, would promote fairness and clarity. When a plaintiff is not at fault and joint and several liability exists, the statute nevertheless could be applied to apportion fault among defendants for purposes of comparative contribution (if Indiana should choose to adopt contribution).⁵⁰

C. *Nonparties and the Apportionment Process*

Under the Indiana Act the fault of nonparties must be considered in calculating the plaintiff's share of fault, reducing the plaintiff's damages, and in apportioning the losses among defendants.⁵¹ Constrained by rules of modified comparative fault, proportionate individual liability, and no-contribution, the decision to include absent parties may appear to have some justification.⁵² If nonparty tortfeasors were ignored the rule of proportionate individual liability could easily be circumvented. The permissive joinder of third-party defendants would allow the plaintiff to sue a single solvent defendant, recover full damages less any reduction due to plaintiff's fault, and thereby achieve a joint and several liability result.⁵³

Including the fault of nonparties, however, is, simultaneously, both ironic and harmful. In considering absent tortfeasors to calculate the plaintiff's share of fault and to apportion losses among defendants, the Indiana Act permits recovery when the fault of the plaintiff exceeds the total fault of all the other parties to the suit, but is less than the total fault of all persons causing harm—an unusual result under modified comparative fault.⁵⁴ Including nonparties is both good and bad for plaintiffs. Permitting fault assessment against all tortfeasors reduces the chances that the plaintiff's fault will preponderate and bar recovery under the Indiana

⁵⁰See *infra* note 82.

⁵¹See *supra* notes 10-14. Section 2(a) of the Indiana Act defines a nonparty as a "person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant." The section further provides: "A nonparty shall not include the employer of the claimant." The exclusion of the claimant's employer from the definition of a nonparty creates special problems in interpreting the correct procedures for fault comparison and fault allocation. See *supra* note 13.

⁵²See McNichols, *supra* note 12, at 212 & n.72. See also *supra* note 35 and accompanying text.

⁵³See McNichols, *supra* note 12, at 215-16; cf. *Paul v. N.L. Indus., Inc.*, 624 P.2d 68, 70 (Okla. 1980) (if there were no incentive for plaintiff to joint all tortfeasors plaintiff could defeat the rule of proportionate individual liability).

⁵⁴Few, if any, modified comparative negligence statutes allow this result. Pearson, *supra* note 19, at 356. Oklahoma's statute arguably allows recovery under these circumstances. McNichols, *supra* note 12, at 217. See also *supra* note 35.

Act.⁵² However, considering absent tortfeasors adversely affects the plaintiff's recovery under proportionate individual liability.⁵⁵

While including nonparties in the apportionment process has a certain appeal,⁵⁶ a majority of states and the Uniform Act restrict fault comparison to parties.⁵⁷ The preferable rule is to consider only the fault of parties to the action. Taking into account absent tortfeasors distorts the

⁵⁵See *supra* note 35 and accompanying text. If *B*'s fault is considered, the plaintiff is not barred from suit because the plaintiff's 30% share is not greater than the 70% share of all tortfeasors (*A* and *B*). Applying proportionate individual liability (without full loss allocation) the plaintiff recovers \$1,000 (10% of plaintiff's total damages) from *A*. If *B*'s 60% uncollectible share is allocated by the Uniform Act's procedure for allocating the burden of insolvency the plaintiff collects \$2,500 (25% of total's damages)—the same result as under pure comparative negligence.

⁵⁶See, e.g., *National Farmers Union Property & Casualty Co. v. Frackelton*, 662 P.2d 1056, 1059-61 (Colo. 1983). In summarizing the policy arguments supporting full comparison, the Colorado Supreme Court noted that considering absent tortfeasors: (1) might result in a more accurate allocation of negligence; (2) does not leave defendants with the difficult task of minimizing their negligence without the opportunity of comparing the negligence of other tortfeasors; (3) would tend to ensure that all claims would be determined in one lawsuit; and (4) may encourage settlements. See also McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence—A Puzzling Choice*, 32 OKLA. L. REV. 1 (1979); Thode, *Comparative Negligence, Contribution Among Tortfeasors, and the Effect of a Release—A Triple Play by the Utah Legislature*, 1973 UTAH L. REV. 406, 425.

A number of jurisdictions consider the fault of nonparties. Among the jurisdictions to have totally or partially abolished joint and several liability, Kansas, New Mexico, and Oklahoma (and now Indiana) consider nonparties to apportion fault. See *Lester v. Magic Chef, Inc.*, 230 Kan. 643, 641 P.2d 353 (1982); *Brown v. Keil*, 224 Kan. 195, 580 P.2d 867 (1978); *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (N.M. Ct. App. 1981), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (N.M. 1982); *Paul v. N.L. Indus., Inc.*, 624 P.2d 68 (Okla. 1980); IND. CODE § 34-3-33-5 (Supp. 1984). Among joint and several liability jurisdictions, a number of states consider the fault of nonparties. See, e.g., *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); *Barron v. United States*, 473 F. Supp. 1077, 1088 (D. Hawaii 1979) (diversity case applying law of Hawaii); *Jensen v. Shank*, 99 Idaho 565, 585 P.2d 1276 (1978); *Bowman v. Barnes*, 282 S.E. 2d 613 (W. Va. 1981); *Connar v. West Shore Equip. of Milwaukee, Inc.*, 68 Wis. 2d 42, 227 N.W.2d 660 (1975); *Board of County Comm'rs v. Ridenour*, 623 P.2d 1174 (Wyo. 1981); see also HEFT & HEFT, *COMPARATIVE NEGLIGENCE MANUAL* § 8.131 (1978).

⁵⁷UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 2. Among proportionate individual liability states, Louisiana, Ohio, New Hampshire, and Vermont limit comparative negligence to parties to the action. E.g., LA. CIV. CODE ANN. art. 2324 (West Supp. 1984); OHIO REV. CODE ANN. § 2315.19A(2) (Page Supp. 1983). Joint and several liability jurisdictions adopting the parties only method include Colorado: *National Farmer's Union Property & Casualty Co. v. Frackelton*, 662 P.2d 1056 (Colo. 1983); Florida: *Kapchuck v. Orlan*, 332 So. 2d 671 (Fla. Dist. Ct. App. 1976); Oregon: *Conner v. Mertz*, 274 Or. 657, 548 P.2d 975 (1976); cf. South Dakota: *Beck v. Wessel*, 90 S.D. 107, 237 N.W.2d 905 (1976) (preferring to consider negligence of immune person). A number of comparative negligence statutes in joint and several liability jurisdictions provide that the plaintiff's negligence should be compared to the negligence of all defendants. See McNichols, *supra* note 12, at 210-11 & n.67; V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 16.6 (Supp. 1981).

truth and integrity of the trial process. Litigating the liability of an absent tortfeasor cannot bind that person under principles of *res judicata* or collateral estoppel⁵⁸ and is approximate justice at best because a trial in absentia cannot ensure that the nonparty was actually at fault or that the jury or judge will accurately determine the nonparty's share of fault.⁵⁹ In a subsequent action, however, a plaintiff may be estopped to deny certain issues that were litigated in the initial suit.⁶⁰ Moreover, if only parties to the suit are considered, the burden of uncollectibility is shared between plaintiffs and defendants and no party has an incentive to exaggerate a nonparty's liability.⁶¹

While the parties-only approach to fault apportionment is the best method to apportion fault, distribute the risks of uncollectibility, and ensure fair trials,⁶² these results could nearly be duplicated if the Uniform Act's approach of allocating the risk of insolvency were applied to allocate uncollectible losses among all parties to the suit.⁶³ Full loss allocation would discourage defendants from embellishing an absent party's liability because all parties would proportionally share the absent party's percentage of fault.

Adopting full loss allocation would also equalize the burden of litigating the liability of the absent parties and would provide an incentive to both plaintiffs and defendants to join all tortfeasors. A tortfeasor may be absent from the lawsuit for a variety of reasons.⁶⁴ The plaintiff may overlook the tortfeasor or simply choose not to sue a particular per-

⁵⁸See *National Farmers Union Property & Cas. Co. v. Frackelton*, 662 P.2d 1056, 1060 (Colo. 1983); UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 2 comment; *Shanley v. Callanan Indus., Inc.*, 54 N.Y.2d 52, 444 N.Y.S.2d 585, 429 N.E.2d 104 (1981).

⁵⁹UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 2 comment.

⁶⁰See, e.g., *Bernhard v. Bank of America*, 19 Cal. 2d 807, 122 P.2d 892 (1942).

⁶¹See *supra* notes 30-32 and accompanying text. By providing for proportionate individual liability and the inclusion of nonparties, the Indiana Act gives party-defendants an incentive to urge that the nonparty is the principal culprit. See *supra* notes 37, 55 and accompanying text.

⁶²The 1984 amendments to the Indiana Act, by excluding a claimant's employer from the fault allocation equation, tacitly recognize the desirability and fairness of leaving nonparties out of the apportionment process. See *infra* notes 66, 75.

⁶³See *supra* text accompanying note 38.

⁶⁴Under the Indiana Act the plaintiff has the full burden and incentive to join all possible tortfeasors as defendants because the Act abolishes joint and several liability. Under the Uniform Act both plaintiffs and defendants have incentives to join other persons at fault since this will have the effect of reducing the amount of their own fault. If full loss allocation were adopted it might be advisable to limit sharing the uncollectible losses attributable to absent parties and insolvent parties among all parties to the suit to cases in which the nonparties are insolvent and unavailable. Without such a limitation full loss allocation could permit the plaintiff to undermine proportionate individual liability by suing less than all solvent and suable defendants. See *supra* note 53 and accompanying text. This limitation has also been suggested for proportionate individual liability jurisdictions which employ a parties-only method of allocation. See *McNichols*, *supra* note 12, at 215 & n.85.

son. More likely the tortfeasor is insolvent,⁶⁵ immune,⁶⁶ unknown,⁶⁷ released,⁶⁸ or not subject to jurisdiction.⁶⁹ Allocating the burden of uncollectibility of a nonparty's share of fault among all parties provides a fair solution to the absent tortfeasor problem. Under full loss allocation it is in the best interest of the plaintiff and the defendant to join all solvent tortfeasors to avoid proportionate reallocation. While the Uniform Act allocates losses by leaving out absent parties,⁷⁰ adopting a special rule for settlement and release,⁷¹ and reallocating fault if a party's share becomes uncollectible,⁷² full loss allocation⁷³ would be consistent with the Uniform Act's fairness principles and would achieve virtually the same⁷⁴ results. While immunities, particularly an employer's immunity under worker's compensation may call for special treatment,⁷⁵ proportionate

⁶⁵See *supra* text accompanying notes 35-37.

⁶⁶See, e.g., *Negley v. Massey Ferguson, Inc.*, 229 Kan. 465, 625 P.2d 472 (1981) (immune employer's negligence must be considered to calculate plaintiff's share of fault and to apportion damages); *Brown v. Keil*, 224 Kan. 195, 580 P.2d 867, (1978) (intersposual and intrafamily immunity doctrines do not preclude consideration of an immune tortfeasor's negligence in apportioning a defendant's responsibility).

⁶⁷See, e.g., *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (N.M. Ct. App. 1981), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (N.M. 1982) (unknown driver's 70% share of fault considered to reduce a fault-free plaintiff's recovery to 30% of total damages).

⁶⁸See, e.g., *Mihoy v. Proulx*, 113 N.H. 698, 313 A.2d 723 (1973) (fault of settling defendant not considered under New Hampshire's comparative negligence statute).

⁶⁹See, e.g., *Greenwood v. McDonough Power Equip. Co.*, 437 F. Supp. 707 (D. Kan. 1977) (negligence of nonparty whose joinder would defeat diversity jurisdiction considered to reduce recovery and apportion damages).

⁷⁰UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 2. See *supra* note 29.

⁷¹UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 6. See *infra* text accompanying notes 87-95.

⁷²UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 2(d). See *supra* note 36.

⁷³See *supra* note 38 and accompanying text.

⁷⁴See *supra* notes 36, 55.

⁷⁵Indeed, the Indiana Act purports to exclude the fault of the claimant's employer from the fault apportionment process. See *supra* note 13. See also *Pearson*, *supra* note 19, at 367 (arguing that loss attributable to an immune person should be distributed among all parties unless the immunity extends only to the plaintiff (e.g., family and worker's compensation immunities) in which case the immune person's negligence should be considered in apportionment but defendant's liability limited to their shares of fault); Pulliam, *Comparative Loss Allocation and the Rights and Liabilities of Third Parties Against an Immune Employer: A Modest Proposal*, 31 FED'N OF INS. COUNSEL Q. 80 (1980) (advocating treating an employer as section 6 of the Uniform Act treats a released party, thereby having the plaintiff incur the loss attributable to the immune employer); Wade, *supra* note 3, at 315-16 (under pure comparative negligence immune tortfeasors should not be made parties to the action or have their fault shares determined once it is clear that immunity to tort liability exists and will also apply to contribution actions. This spreads the risk of an immune person's obligation among all parties in proportion to their fault); Note, *Comparative Negligence*, 81 COLUM. L. REV. 1668, 1699 (1980) (proposing proportional allocation of the immune person's share of fault among all parties); UNIF. COMPARATIVE FAULT ACT, *supra* note 3,

allocation of the fault of absent and insolvent parties would not preclude developing particular rules to treat various immunities.⁷⁶

D. Contribution and Indemnity

The Indiana Act carries forward the prior Indiana rule barring contribution among joint tortfeasors.⁷⁷ The great majority of the states either by statute or judicial decision grant contribution in one form or another. A number of states, as well as the Uniform Act, grant contribution based upon the defendant's relative share of fault.⁷⁸ The Indiana Act's proportionate individual liability rule ends the unfair treatment of defendants caused by the combination of joint and several liability with no right of contribution.⁷⁹ If the unfair treatment to plaintiffs is accepted, the Act also virtually eliminates the argument for contribution in all cases in which the plaintiff is at fault.⁸⁰ If full loss allocation is not employed, joint and several liability should be retained when the plaintiff is not at fault.⁸¹ In that event, the application of comparative fault principles could and should result in contribution based upon the defendants' proportionate share of fault.⁸²

at § 6 comment (discussing various solutions including: treating the immune tortfeasor as a released party, spreading the immune party's obligation among all parties at fault as in the case of an insolvent party and leaving the immune party out of the action altogether, thereby spreading the risk among all parties in proportion to their fault). The NCCUSL Committee drafting the Uniform Act originally prepared a section on employer immunity which divided the employer's share of fault between the plaintiff and defendants and permitted contribution against the employer by the defendant. The Committee chose to drop the section on the ground that it belonged in the worker's compensation act. Wade, *supra* note 3, at 317 & n.69.

⁷⁶UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 6 comment.

⁷⁷IND. CODE § 34-4-33-7 (Supp. 1984); Hunt v. Lane, 9 Ind. 248, 250 (1857); State v. Clark, 175 Ind. App. 358, 371 N.E. 1323 (1978); Smith v. Graves, 59 Ind. App. 55, 108 N.E.2d 168 (1915).

⁷⁸See, e.g., UNIF. COMPARATIVE FAULT ACT, *supra* note 3, § 4.

⁷⁹See *supra* note 20 and accompanying text.

⁸⁰There are a few situations in which contribution is arguably needed even if a defendant is only subject to proportionate individual liability. See Laubach v. Morgan, 588 P.2d 1071, 1074 (Okla. 1978) (tortfeasors treated as "unit"); McNichols, *supra* note 12, at 234-35 & n.155 (joint tortfeasors acting in concert).

⁸¹See *supra* text accompanying notes 41-43.

⁸²See UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 4; Fleming, *supra* note 9, at 251; Pearson, *supra* note 19, at 369 & n.100; Note, *Comparative Negligence*, *supra* note 75, at 1694. The intuitive fairness of proportionate contribution has led courts in New York and California to circumvent restrictive "pro rata" contribution statutes by judicially adopting "partial equitable indemnity," which in essence is a rule of comparative contribution. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); Dole v. Dow Chemical Company, 30 N.Y.S.2d 143 (1972). See also Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983). A majority of the states that retain joint and several liability have adopted comparative contribution. See McNichols, *supra* note 12, at 239 & n.168. If comparative contribution is adopted, however, the need and justification

The Indiana Act "does not affect any rights of indemnity."⁸³ Under Indiana law a right of indemnity exists between joint tortfeasors only in an express contract⁸⁴ or when a party, without fault, is compelled to pay damages because of the wrongful act of another as in the case of an employer's vicarious liability for the torts of an employee.⁸⁵ Permitting indemnity within a comparative fault framework in these limited situations is reasonable; however, allowing common law indemnity in other circumstances can subvert comparative negligence principles.⁸⁶

E. The Effect of Settlement

Suppose *P* settles with tortfeasor *B* for \$2,000 and proceeds to trial against defendant *A*. If the jury awards \$10,000 in damages and finds *P* 10% at fault, defendant *A* 30% at fault, and *B* 60% at fault, who bears the burden of the loss attributable to *B*? In the absence of settlement, *B* would have paid \$6,000 rather than \$2,000. The Indiana Act makes no express provision for how to treat a settlement. Under the Uniform Act the released person is discharged from all liability but the plaintiff's recovery against the other tortfeasors is reduced by the amount of the released person's "equitable share of the obligation."⁸⁷ Thus *B* is completely discharged, *B*'s share of fault (\$6,000) is subtracted from *P*'s recovery, and *P* recovers \$3,000 from defendant *A*. The Uniform Act thus places the risk of an undervalued settlement on the plaintiff. This may have a somewhat discouraging effect on settlements because the plaintiff risks losing a portion of the damages.⁸⁸ In the case of an overvalued settlement, however, the plaintiff is able to keep any portion of the settlement that is above the settler's equitable share of the obligation. In the example above, if plaintiff settles with *B* for \$10,000, the plaintiff receives a windfall of \$4,000. This result tends to counteract the potential disincentive to settle.⁸⁹

Allocating the settling tortfeasor's share of fault to the plaintiff in the case of an undervalued settlement arguably is inconsistent with the principle that liability should be apportioned according to fault. In the

for proportionate individual liability all but disappear. McNichols, *supra* note 12, at 239; *but see* Laubach v. Morgan, 588 P.2d 1071, 1075 (Okla. 1978) (rejecting comparative contribution as an alternative to proportionate several liability because, *inter alia*, proportionate several liability avoids a multiplicity of suits).

⁸³IND. CODE § 34-4-33-7 (Supp. 1984).

⁸⁴McClish v. Niagara Mach. & Tool Works, 266 F. Supp. 987 (S.D. Ind. 1967).

⁸⁵*Id.*

⁸⁶*See, e.g.,* B&B Auto Supply v. Central Freight Lines, Inc., 603 S.W.2d 814 (Tex. 1980); Tolbert v. Gerber Industries, 265 N.W.2d 362 (Minn. 1977).

⁸⁷UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 6.

⁸⁸*See* Miller, *supra* note 19, at 866; Wade, *supra* note 9, at 391.

⁸⁹UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 6 comment. *See* Miller, *supra* note 19, at 866.

previous example, although only 10% at fault, *P* is charged with *B*'s 60% share of fault and recovers only 50% of the total damages (taking into account the settlement). This result can be justified because the plaintiff contracted for the settlement and consciously took on such a risk. Other methods for dealing with settlements, particularly the "pro tanto" and "no contribution" approaches, present similar problems under comparative fault.⁹⁰

⁹⁰Under the "pro tanto" approach, the amount of the settlement is deducted from the judgment regardless of the settler's share of fault. *See, e.g.*, UNIF. CONTRIBUTION AMONG JOINT TORTFEASORS ACT (1939) § 4, 12 U.L.A. 57-8 (West 1975). Under the "pro tanto" approach, the nonsettling defendant bears the full risk of an undervalued settlement in a joint and several liability jurisdiction which considers the fault of the settling nonparty tortfeasor. In the example set forth, if *B*'s fault is adjudicated at 60%, under joint and several liability defendant *A* must pay 90% of an \$8,000 judgment (the \$10,000 award less the \$2,000 settlement with *B*) or a total of \$7,200 despite being only 30% at fault.

If, on the other hand, *B*'s fault is not considered presumably *P*'s 10% share and *A*'s 30% share would result in a 25% fault share for *P* with 75% for *A*. *A* would then be liable to *P* for \$6,000—a just result because *P* and *A* have borne the "loss" due to the undervalued settlement in proportion to their relative degrees of fault. In short, ignoring the nonparty's fault achieves fair loss apportionment. The same result obtains under proportionate individual liability if the fault of the settling nonparty tortfeasor is not considered. If the fault of the settling party (*B*) is considered in a proportionate individual liability state such as Indiana, the pro tanto approach actually benefits the nonsettling defendant and increases the burden of an undervalued settlement to the plaintiff. Under proportionate individual liability all *P* can recover from *A* is 30% of *P*'s damages. If *P*'s damages are reduced to \$8,000 because of the \$2,000 settlement with *B*, *P* receives \$2,400, as opposed to the \$3,000 which would have been recovered if *P*'s judgment had not been reduced.

The 1955 version of the Uniform Contribution Among Joint Tortfeasors Act employs the pro tanto approach and further provides that a release is binding against other tortfeasors if given in good faith. The good faith requirement can prompt much litigation. *See Miller, supra* note 19. The first version of the Uniform Contribution Among Joint Tortfeasors Act (1939) shifted the risk of a low settlement to the settling tortfeasor by permitting contribution in the amount by which the settling tortfeasor's share exceeded the dollar value of the settlement. Although this approach achieves fair apportionment, it seriously discourages settlements and of course depends upon the existence of a right of contribution.

Another approach, previously followed in Indiana, is to take no account of a settlement and do nothing to the judgment in a lawsuit against the nonsettling defendant. The principle behind such a "no contribution" rule was that the courts should not assist a wrongdoer in spreading the consequences of his or her wrongful acts. *See, e.g.*, *Merryweather v. Nixon*, 101 Eng. Rep. 1337 (K.B. 1799). Indiana follows this traditional common law rule. *See supra* note 77.

Indiana has also long recognized the validity of loan receipt agreements, whereby the plaintiff receives a pretrial payment from one tortfeasor under a loan agreement and then proceeds against another tortfeasor for the plaintiff's entire damages. The plaintiff is allowed to recover full damages from the second tortfeasor (with a duty to repay the first tortfeasor in accordance with the loan agreement). *See, e.g.*, *Geyser v. City of Logansport*, 370 N.E.2d 333 (Ind. 1977). Taking no account of the settlement or loan receipt creates no risks to the plaintiff of an undervalued settlement, however, not allowing a tortfeasor who has paid an entire judgment to recover from another tortfeasor who has paid less than his or her share of the damages is intrinsically unfair and inconsistent with the principle of liability

The Indiana Act, in operative effect, adopts the Uniform Act's approach to settlements. The Act requires that the factfinder determine the percentage of fault of all nonparties⁹¹ (a dictate which includes tortfeasors who have settled with the claimant). Under the Act's proportionate individual liability rule,⁹² the claimant's recovery is diminished by the percentage of fault allocated to the settling nonparty tortfeasor. In short, both the Indiana and Uniform Acts impute the fault share of a settling tortfeasor to the plaintiff.⁹³

Another possible method for treating settlements is to allocate the damages associated with the settling tortfeasor's share of fault among all parties in proportion to their fault by utilizing the Uniform Act's method of apportioning the liability of an insolvent defendant.⁹⁴ Dividing the risks of an undervalued settlement and the benefits of an overvalued settlement among all parties in proportion to fault achieves fair loss apportionment without reducing incentives for settlement.⁹⁵

F. Set-Off

Under the "not greater than" version of modified comparative fault adopted by the Indiana Act, a claimant may recover reduced damages if the claimant's fault does not exceed the total fault of all tortfeasors. What happens if a defendant also sustains damages and files a counterclaim? The Act does not mention counterclaims or the subject of set-off. Suppose *P* sues defendant *A*, *A* files a counterclaim and the jury or judge finds *P* 30% at fault, *A* 40% at fault, and nonparty *B* 30%

in proportion to fault. See, e.g., *Dobson v. Camden*, 705 F.2d 759, 767 (8th Cir. 1983). The Indiana Act eliminates the special status of loan receipt agreements by limiting the plaintiff's recovery against the nonsettling defendants to their individual percentages of fault. The Act requires the factfinder to determine the fault share of the settling or "loaning" tortfeasor. Including "loaning" or settling parties, in tandem with the proportionate individual liability rule, means that the plaintiff bears the full risk of an undervalued settlement or "loan."

⁹¹IND. CODE § 34-4-33-5(a)(1) (Supp. 1984).

⁹²See *supra* note 15.

⁹³Under the Indiana Act, the plaintiff also bears the risk of an undervalued loan receipt agreement. See *supra* note 90.

⁹⁴See *supra* text accompanying notes 62-76.

⁹⁵To illustrate, if in the example set forth in the text, plaintiff settles with *B* for \$2,000 and the jury finds *B* 60% at fault, plaintiff and defendant *A* would share the \$4,000 uncollectible "loss" (the difference between the \$6,000 which *B* would have paid but for the settlement and the \$2,000 *B* actually paid in settlement) in proportion to their relative fault. *A* (30% at fault) pays plaintiff an additional \$3,000 and plaintiff (10% at fault) absorbs \$1,000 in damages since the ratio of *A*'s liability to plaintiff's is three to one. By contrast if, as in the example given in *supra* note 90, plaintiff settles with *B* for \$10,000, plaintiff and defendant *A* mutually benefit and share the \$4,000 excess in proportion to their relative fault with the result that *A* pays no damages. In the case of a settlement greater than the

at fault. Since *A*'s fault does not exceed the fault of all tortfeasors, sections four and five of the Act⁹⁶ suggest *A* should be allowed to recover from *P*. If *P* and *A* may recover against each other, are their recoveries set-off so that only one party recovers a judgment (unless damages are equal), or does each recover a judgment against the other for 30% and 40% of the damages respectively? In either case, what are the effects of insurance or inability of either party to pay? The set-off problem is complicated and the Indiana Act offers no guidance. Several types of situations call for different results.

Set-offs involve a single claim and counterclaim between only two parties.⁹⁷ If both parties can pay the judgments, set-off is appropriate.⁹⁸ If both parties have insurance, a set-off rebounds to the benefit of the insurance companies, at the expense of the parties.⁹⁹ If one party is able to pay and the other cannot, set-off protects the solvent party.¹⁰⁰ If one party has insurance but the other does not and cannot pay, set-off leaves a greater portion of the loss uninsured.¹⁰¹ If there are multiple defen-

total damages, the plaintiff receives no additional recovery but keeps the excess, a result which encourages settlement.

⁹⁶IND. CODE § 34-4-33-4, -5 (Supp. 1984).

⁹⁷See UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 3 comment.

⁹⁸*Id.* at § 3, Illustration No. 5.

⁹⁹To illustrate: *A* sues *B*. *B* counterclaims. *A* and *B* are each found 50% at fault. *A*'s damages are assessed at \$60,000 and *B*'s damages at \$30,000. Thus, *B* is liable to *A* for \$30,000 and *A* is liable to *B* for \$15,000. If set-off is allowed *B*'s insurer pays *A* \$15,000 and *A*'s insurer pays *B* nothing. Absent set-off, *B*'s insurer pays \$30,000 to *A* and *A*'s insurer pays \$15,000 to *B*. A similar result occurs if *A* is found 30% at fault, *B* 40% at fault, and a nonparty (*C*) 30% at fault. *B* would then be liable to *A* for \$24,000 and *A* would be liable to *B* for \$9,000. If set-off is permitted *B*'s insurer would pay *A* \$15,000 and *A*'s insurer would pay nothing. If set-off is not allowed *B*'s insurer would pay \$24,000 to *A* and *A*'s insurer would pay \$9,000 to *B*. In short, under set-off the burden of loss is greater for both parties.

Cf. UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 3 illustration 4 (example under pure comparative negligence). If full loss allocation is applied, *C*'s 30% share would be divided between *A* and *B* in proportion to their relative shares of fault (3:4). Thus, *B* would additionally bear 4/7 of *C*'s \$18,000 liability to *A* and *A* would bear 3/7 of *C*'s \$9,000 liability to *B*. *B* would then be liable to *A* for \$34,285 (\$24,000 plus 4/7 of \$18,000). *A* would then be liable to *B* for \$12,857 (\$9,000 plus 3/7 of \$9,000). If set-off is allowed *B*'s insurer would pay \$21,428 and *A*'s insurer would pay nothing.

¹⁰⁰Assume the same facts as in *supra* note 99, with *B* liable to *A* for \$30,000 and *A* liable to *B* for \$15,000, except no insurance and *A* can pay the judgment, while *B* cannot. With set-off *A* pays nothing and receives nothing since *B* is insolvent. Absent set-off, *A* pays *B* \$15,000 but receives nothing. *Cf.* UNIF. COMPARATIVE FAULT ACT, *supra* note 3, § 3 illustration 6 (example under pure comparative negligence).

¹⁰¹Same facts as in *supra* note 99, except *B* has insurance and *A* is uninsured and cannot pay. Under set-off *B*'s insurer pays *A* \$15,000 and *B* recovers nothing from *A*. If set-off is not permitted, *B*'s insurer will pay *A* \$30,000. *Cf.* UNIF. COMPARATIVE FAULT ACT, *supra* note 3, § 3 illustration 7 (example under pure comparative negligence).

dants, separate set-off issues can arise between the plaintiff and each of the several defendants whose individual percentage of fault is less than 51% of the total fault of all tortfeasors. Similarly, set-off questions can arise when a cross-claim is subject to a counterclaim.

The set-off provision in the Uniform Act generally bars set-offs except by agreement of both parties¹⁰² and provides a workable formula for dealing with a party's inability to pay.¹⁰³ When multiple defendants file counterclaims or cross-claims, the Uniform Act separates set-off issues by considering each claim (or cross-claim) and counterclaim independently of the others.¹⁰⁴ The set-off provisions of the Uniform Act yield workable results in the various set-off situations and should be incorporated into the Indiana Act.¹⁰⁵

¹⁰²The Uniform Act, therefore, would not permit set-off in the illustrations set forth in *supra* note 99.

¹⁰³See UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 3 comment. In the event that the obligation of either party is wholly or partially uncollectible, the formula, $D = C - O + P$ can be used to determine the amount each party is entitled to receive. D signifies the amount to be distributed to the particular claimant from the funds paid into the court; C signifies the amount owed to the claimant by the other party; O signifies the amount the claimant owes to the other party and P signifies the amount the claimant has paid into the court. For example: A sues B, B counterclaims. A is found 30% at fault, B 40% at fault, and a nonparty (C) 30% at fault. A's damages are assessed at \$50,000 and B's damages at \$100,000. Both parties have inadequate insurance coverage and no other available funds. A carries liability insurance of \$20,000 and B carries \$10,000 of coverage. Following § 3, on granting a motion to pay into the court, A's carrier would pay in \$20,000 and B's carrier would pay in \$10,000. Applying the $D = C - O + P$ formula for A: C is \$20,000 (B owes A 40% of A's \$50,000 in damages), O is \$30,000 (A owes B 30% of B's \$100,000 in damages) and P equals \$20,000 (amount paid in). Thus $D = [\$30,000 - \$20,000 + \$10,000] \$20,000$. For B: C is \$30,000 (amount owed by A), O is \$20,000 (amount owed by B) and P is \$10,000 (amount paid in). Thus $D = [\$30,000 - \$20,000 + \$10,000] \$20,000$. Under full loss allocation C's 30% share would be divided between A and B in proportion to their relative shares of fault (3:4). Thus B would additionally pay 4/7 of C's \$15,000 liability to A (\$8,565) and A (\$8,565) and A would bear 3/7 of C's \$30,000 liability to B (\$17,130.00). Under the formula, for A: $D = [\$28,565 - \$47,130 + \$20,000] \$1,435$. For B: $D = [\$47,130 - \$28,565 + \$10,000] \$28,565$.

¹⁰⁴UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 3 comment.

¹⁰⁵See Wade, *supra* note 3, at 311-12; R. Keeton, *Legal Process and Comparative Negligence Cases* 17 HARV. J. ON LEGIS. 1 (1980). Florida allows set-off to reciprocal verdicts between the same parties but not when liability insurance exists. *Bournazian v. Stuyvesant Ins. Co.*, 303 So. 2d 71 (Fla. Dist. Ct. App. 1974) *aff'd* 342 So. 2d 471 (Fla. 1977). See also *Redwing Carriers, Inc. v. Watson*, 341 So. 2d 1049 (Fla. Dist. Ct. App. 1977); California does not permit set-off when parties are insured. *Jess v. Herrman*, 26 Cal. 3d 131, 604 P.2d 208, 161 Cal. Rptr. 87 (1979). Rhode Island and Oregon flatly prohibit set-off in their comparative negligence statutes. OR. REV. STAT. § 18,490 (1978); R.I. GEN. LAWS § 9-20-4.1 (Supp. 1982). As originally introduced, the Indiana Act contained a provision which permitted set-off except when a portion of the claim or counterclaim was covered by insurance; however, the Senate Judiciary Committee deleted the entire section. See BAYLIFF, *COMPARATIVE FAULT PROBLEMS* 10 (1983). New York considered a no set-off provision when it enacted its comparative negligence statute. R. Keeton, *supra* at 33 & n.41.

G. Definition of Fault

The Indiana Act's definition of "fault" varies from the Uniform Act's definition in three significant respects.¹⁰⁶ Unlike the Uniform Act, the Indiana Act presently does not encompass strict or products liability actions, breach of warranty, or product misuse. The Indiana Act also differs from the Uniform Act by including "willful and wanton conduct" and expressly excluding "intentional acts."¹⁰⁷ The decision to exclude strict liability suits and actions involving unreasonably dangerous products is unfortunate and against a clear trend in favor of including products liability cases within the framework of comparative fault.¹⁰⁸ Fairness, economic efficiency, and procedural practicality strongly favor an approach to loss apportionment that is consistent in its treatment of all parties to the action, whether the suit is founded on negligence or strict liability.

¹⁰⁶Section 2(a) provides in pertinent part:

"Fault" includes any act or omission that is negligent, willful, wanton, or reckless toward the person or property of the actor or others, but does not include an intentional act. The term also includes unreasonable assumption of the risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.

IND. CODE § 34-4-33-2(a) (Supp. 1984). *Cf.* UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 1(b).

¹⁰⁷The choice of the words "intentional acts" as opposed to "intentional torts" was probably inadvertent. Driving an automobile or shooting a gun usually are intentional acts. Taken literally, this exclusion would insulate otherwise actionable conduct if the act was committed purposefully or with substantial knowledge of the consequences. *See* RESTATEMENT (SECOND) OF TORTS § 8A (1965). The Commissioners' comment to section 1 of the Uniform Act notes that "The Act does not include intentional torts."

¹⁰⁸A majority of the jurisdictions which have considered the issue apply comparative fault to strict and products liability actions. *See* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); ARK. STAT. ANN. §§ 27-1763 to-1765 (1979); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); COLO. REV. STAT. § 13-21-406 (Supp. 1982); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Kaneko v. Hilo Coast Processing, 65 Haw. 447, 654 P.2d 343 (1983); Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (1976) (applying Idaho law); Coney v. J.L.G. Indus., Inc., 97 Ill. 2d 104, 454 N.E.2d 197 (1983); Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980); ME. REV. STAT. ANN. tit. 14 § 156 (1980); Austin v. Raybestos Manhattan, Inc., PROD. LIAB. REP. (CCH) ¶ 9924 (Me. 1984); MICH. COMP. LAWS ANN. § 600.2949 (Supp. 1982); Busch v. Busch Construction, Inc., 262 N.W.2d 377 (Minn. 1977); Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1976) (applying Mississippi law); Reid v. Spadone Mach. Co., 119 N.H. 457, 404 A.2d 1094 (1979); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); Day v. General Motors Corp., 345 N.W.2d 349 (N.D. 1984); Wilson v. B.F. Goodrich, 292 Or. 626, 642 P.2d 644 (1982); McPhail v. Municipality of Culeba, 598 F.2d 603 (1st Cir. 1979); Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (1981); Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979); WASH. REV. CODE §§ 4.22.005-.015 (Supp. 1983-84); Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967). The Fifth Circuit Court of Appeals now applies comparative fault to maritime strict products liability actions. *Lewis v. Timco, Inc.*, 716 F.2d 1425 (5th Cir. 1983).

The application of comparative fault to products liability cases promotes fairness by abolishing the "all or nothing" effect of traditional strict tort liability defenses, such as assumption of the risk and product misuse, in favor of a general scheme of liability in proportion to fault.¹⁰⁹

Concerns for economic efficiency also favor employing comparative fault in strict liability cases. Essentially, the efficiency inquiry is which party can prevent the injury at the least cost? The failure to allocate accident costs in proportion to the relative fault of all parties—negligent plaintiffs, negligent defendants, and strictly liable defendants—causes inefficiency because manufacturers must include in their cost calculus those accident costs caused by negligent use even when such accidents could have been avoided more cheaply by product users than by the product manufacturer.¹¹⁰

Excluding strict tort liability actions from the comparative fault system unnecessarily complicates pretrial and trial procedures. If the plaintiff's complaint contains alternative counts for recovery in negligence, strict products liability, and breach of warranty, the plaintiff's conduct becomes a thorny characterization question: Did the plaintiff's use of the product constitute contributory negligence, assumption of the risk, or misuse? Much depends upon the answer. A negligent plaintiff obtains a full recovery under a strict products liability theory versus a diminished recovery under negligence or breach of warranty counts. The procedural problems of disparate treatment of products liability and negligence actions have moved many courts to adopt comparative fault for strict tort liability cases.¹¹¹

¹⁰⁹As recently observed in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984): "[A]ll or nothing" strict liability defenses are outmoded and undesirable doctrinal throwbacks resulting in unfairness to plaintiffs, to defendants, and to other product producers who ultimately absorb the loss through price setting In the absence of apportionment, some manufacturers bear the total expense of accidents for which others are partly to blame, while other manufacturers totally escape liability even though they have sold defective products. Either result is unacceptable.

See also *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1430-31 (5th Cir. 1983); Sales, *Assumption of the Risk and Misuse in Strict Tort Liability—Prelude to Comparative Fault*, 11 TEX. TECH. L. REV. 729, 776-78 (1980).

¹¹⁰See A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 102-103 (1983); *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1432-33 (5th Cir. 1983) (comparative fault results in: (1) a more efficient allocation of the short term and long term costs of accident prevention by limiting the manufacturer's share of accident costs to only those costs caused by product defects; (2) a more efficient utilization of resources by creating incentives for product use to avoid accidents that could have been avoided more cheaply by users than by the manufacturer; (3) an efficient amount of product use in the economy or activity by reducing the risks that the price of the product will reflect a subsidy by non-negligent users of the accident costs associated with negligent users).

¹¹¹See, e.g., *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 43, 46 (Alaska 1976). See also *supra* note 108.

Separate rules and systems for strict liability and negligence cases have not fared well in practice, as a number of states have discovered.¹¹² Although arguments have been advanced that comparing a plaintiff's contributory negligence with a defendant's product defect poses conceptual problems,¹¹³ strict liability for both abnormally dangerous activities and for products involves a measure of fault that can be compared with negligent conduct.¹¹⁴ Jurisdictions which have applied comparative fault to products liability actions have not experienced any significant difficulties.¹¹⁵ In addition to strict and products liability cases, the Indiana Act should also encompass actions alleging misuse of a product for which the defendant otherwise would be liable¹¹⁶ and breach of warranty involving physical harms to persons or property.¹¹⁷

II. EFFECT OF COMPARATIVE FAULT ON OTHER TORT DOCTRINES

Supplanting contributory negligence with a comprehensive system of comparative fault has important reverberations for a host of tort law concepts. Discussion of the ramifications of comparative fault on all possible

¹¹²See *supra* note 108. See, e.g., *Duncan v. Cessna Aircraft Co.*, 655 S.W.2d 414 (Tex. 1984).

¹¹³Some courts and commentators have argued that the theory of strict liability does not lend itself to a comparison of fault, characterizing the attempt as involving "apples and oranges." See, e.g., *Melia v. Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976) (applying Nebraska law); *Smith v. Smith*, 278 N.W.2d 155 (S.D. 1979); *Daly v. General Motors*, 20 Cal. 2d 725, 762-63, 575 P.2d 1162, 1184, 144 Cal. Rptr. 380, 403 (1978) (Mosk, J., dissenting); *Feinberg, The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2d*, 42 INS. COUNSEL J. 38 (1975); *Robinson, Square Pegs (Products Liability) In Round Holes (Comparative Negligence)*, 52 CAL. ST. B.J. 16 (1977); *Twerski, From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297 (1977); *Note, Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73, 102 (1976).

¹¹⁴V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 12.7, at 207 (1974); *Brewster, Comparative Negligence in Strict Liability Cases*, 42 J. AIR. L. & COMM. 107 (1976); *Fleming, supra* note 9, at 270; *Wade, Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 376-81 (1978); *Woods, Product Liability: Is Comparative Fault Winning the Day?*, 36 ARK. L. REV. 360, 382 (1982); *Special Project, Texas Tort Law in Transition*, 57 TEX. L. REV. 381, 491-98 (1979); *UNIF. COMPARATIVE FAULT ACT, supra* note 3, at § 1(b) comment.

¹¹⁵See *supra* note 108. See also *Owen & Moore, Comparative Negligence in Maritime Personal Injury Cases*, 43 LA. L. REV. 942, 948 (1983).

¹¹⁶If the injury results from an abnormal or unintended use of the product that was not reasonably foreseeable, the product is not unreasonably dangerous and the seller is not liable under section 402A. *RESTATEMENT (SECOND) OF TORTS* § 402A, comment (h) (1965); *1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY* § 15.01 at 51 (1973).

¹¹⁷The Uniform Act includes breach of warranty within its definition of fault. *UNIF. COMPARATIVE FAULT ACT, supra* note 3, at § 1(b); *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1427 & n.1 (5th Cir. 1983) ("We already apply comparative fault in [maritime] negligence cases and we see no principled distinction for doing otherwise with warranty cases.").

tort doctrines is beyond the scope of this or perhaps any Article. A few of the more significant topics are, however, worth noting.

A. *Punitive Damages*

The provisions of the Indiana Act relating to "willful and wanton conduct" and "intentional acts"¹¹⁸ raise a question concerning the effect of comparative fault on the recovery of punitive damages. Courts considering the question have held that punitive damages may be awarded under comparative fault principles and should not be reduced by the plaintiff's share of fault.¹¹⁹

B. *Last Clear Chance*

The abolition of contributory negligence should signal the end of the doctrine of last clear chance.¹²⁰ To give continued life to the doctrine would undermine the principle of liability in proportion to fault.¹²¹ The Uniform Act¹²² and a wide majority of states¹²³ eliminate last clear chance on the ground that the doctrine is completely inconsistent with comparative negligence.

C. *Imputed Negligence*

Imputed negligence issues can arise in a number of settings.¹²⁴ For example, the contributory negligence of one spouse injured in an accident is usually attributed to the other spouse in an action for loss of consortium.¹²⁵ It is not clear whether the Indiana Act imputes fault to

¹¹⁸IND. CODE § 34-4-33-2(a) (Supp. 1984). *See supra* note 107.

¹¹⁹*See, e.g.,* Amoco Pipeline Co. v. Montgomery, 487 F. Supp. 1268 (W.D. Okla. 1980); Tampa Elec. Co. v. Stone & Webster Eng'g Corp., 367 F. Supp. 27 (M.D. Fla. 1973); Ruiz v. Southern Pacific Transp. Co., 97 N.M. 194, 638 P.2d 406 (N.M. Ct. App. 1981), *cert. denied*, 97 N.M. 242, 638 P.2d 1087 (1981), *noted in* Note, *Torts, Survey of New Mexico Law: 1981-82*, 13 N.M.L. REV. 473 (1983); Thirty v. Armstrong World Services, 661 P.2d 515 (Okla. 1983).

¹²⁰The doctrine originated in *Davies v. Mann*, 152 Eng. Rep. 588 (Ex. 1842), and served to excuse the plaintiff's antecedent negligence if the defendant, after becoming aware of the plaintiff's situation, failed to exercise ordinary care to avoid the injury. The Restatement (Second) of Torts also recognizes the application of last clear chance when the defendant, in the exercise of due care, should have discovered the plaintiff's peril. RESTATEMENT (SECOND) OF TORTS §§ 479(b)(ii), 480(b) (1965). Indiana, however, applies the last clear chance doctrine only in situations in which the peril is known and can be avoided by due care. *Cartwright v. Harris*, 400 N.E.2d 1192, 1197 (Ind. Ct. App. 1980).

¹²¹*See, e.g.,* Kaatz v. State, 540 P.2d 1037, 1050 (Alaska 1980).

¹²²UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 1(a).

¹²³*See* Annot., 78 A.L.R.3d 339, § 15(b) (Supp. 1983).

¹²⁴*See* Wade, *supra* note 3, at 314-15; *see, e.g.,* Bender v. Peay, 433 N.E.2d 788 (Ind. Ct. App. 1982).

¹²⁵Wade, *supra* note 3, at 314-15.

fault-free parties, and if so, with what effect.¹²⁶ The statute refers to decreasing the claimant's damages in proportion to "any contributory fault chargeable to the claimant,"¹²⁷ and states that "the claimant is barred from recovery if his contributory fault is greater than the fault of all persons."¹²⁸ The Uniform Act is similar.¹²⁹ The language used is properly general in scope, leaving resolution of imputed negligence problems to the discretion of the courts.

D. Worker's Compensation

The interplay between the worker's compensation system and comparative fault raises several issues.¹³⁰ In addition to raising questions about how to treat employer immunity,¹³¹ comparative fault principles potentially affect the right of the employer (or its insurer) to reimbursement for compensation benefits paid to the injured employee. Most states that have considered the impact of comparative negligence on the right of subrogation have preserved lien and subrogation rights.¹³² A few states have permitted reduction of the amount of reimbursement by the percentage of the employer's concurrent negligence.¹³³ The Uniform Act does not address the problem of subrogation because the issue was perceived as a concern of the individual states' policy concerning worker's compen-

¹²⁶*Stull v. Ragsdale*, 273 Ark. 277, 620 S.W.2d 264 (1981), provides an interesting illustration of the imputed negligence problem. Under the Arkansas modified comparative negligence statute, a wife's 75% share of negligence was imputed to her husband in his action for loss of consortium. The court permitted the husband to recover 25% of his damages. See Note, *Imputed Negligence Under the Arkansas Comparative Liability Statute, Exception: Stull, Adm'x v. Ragsdale*, 35 ARK. L. REV. 722 (1982).

¹²⁷IND. CODE § 34-4-33-3 (Supp. 1984) (emphasis added).

¹²⁸IND. CODE § 34-4-33-4 (Supp. 1984).

¹²⁹UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at §§ 1(a), 2(a)(2). The word "chargeable" also appears in section 1(a) of the Uniform Act and the Commissioners' comment to this section states that:

"Contributory fault chargeable to the claimant" includes legally imputed fault as in the cases of principal and agent and of an action for loss of services of a spouse. It also covers a situation in which fault is not imputed but would still have barred recovery prior to the passage of the Act—as, for example, a wrongful death action in which the decedent's contributory negligence would have barred recovery even though it was not imputed to the person bringing the action.

¹³⁰For an excellent discussion of the various problems raised by worker's compensation, see McNichols, *supra* note 12, at 250-63.

¹³¹See *supra* note 75.

¹³²McNichols, *supra* note 12, at 260-61 & n.269.

¹³³See, e.g., *Associated Constr. & Equip. Co. v. Worker's Comp. Appeals Bd.*, 22 Cal. 3d 829, 587 P.2d 684, 150 Cal. Rptr. 888 (1978) (The "concurrently negligent employer should receive either credit or reimbursement for the amount by which his compensation liability exceeds his proportional share of the injured employee's recovery."); McNichols, *supra* note 12, at 260-63.

sation and therefore as inappropriate in a Uniform Act covering contribution.¹³⁴

The Indiana Act provides no certain answer or procedures for handling the employer's or insurer's lien and subrogation rights. Section twelve provides that subrogation claims or liens for medical expenses or other benefits paid for personal injury or death are to be reduced in proportion to the claimant's share of fault; however, this provision does not apply to employer subrogation claims or liens.¹³⁵ If the employer is at fault, or if both the employee and employer are at fault, the Act does not avert to a possible diminution of the amount of an employer's subrogation or lien claim. As drafted, the Act appears to preclude any determination of the claimant's employer's fault,¹³⁶ with the result that a negligent employer may fully recover compensation benefits from negligent third parties. The subject of the relationship between comparative fault and the employer's reimbursement rights merits the legislature's further attention.

III. PROCEDURAL QUESTIONS

A. *Basis for Comparison*

The Indiana Act requires judges to instruct juries to "determine the percentage of fault of the claimant, of the defendant, and of any person who is a nonparty."¹³⁷ The statute, however, conspicuously omits any guidelines for fault comparison. The Uniform Act expressly provides that the trier of fact is to "consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed."¹³⁸ By incorporating the relative directness of

¹³⁴See Wade, *Products Liability and Plaintiffs Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 389-90 (1978) (proposing a supplementary provision to the Uniform Act to divide an employer's percentage of fault between the employer and the employee); Hertz, *The Tort Triangle: Contribution From Defendants Whom Plaintiffs Cannot Sue*, 32 ME. L. REV. 83, 136-44 (1980).

¹³⁵IND. CODE § 34-4-33-12 (Supp. 1984) (This section provides in pertinent part: "If a subrogation claim or other lien or claim . . . that arose out of a payment of medical expenses or other benefits exists"). Presumably, section 12 was intended to apply to subrogation claims and liens by health care providers or health insurers (e.g., Blue Cross) who were free from any negligence or fault.

¹³⁶See *supra* note 13.

¹³⁷IND. CODE § 34-4-22-5 (Supp. 1984).

¹³⁸UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 2(b). The Commissioners' comment to § 2 notes that,

[T]he conduct of the claimant or of any defendant may be more or less at fault, depending upon all the circumstances including such matters as (1) whether the conduct was mere inadvertence or engaged in with an awareness of the danger involved, (2) the magnitude of the risk created by the conduct, including the number

causal relationship into a pure fault comparison method the Uniform Act avoids the drawbacks of comparing the relative causal contributions of each tortfeasor to the claimant's injury, so-called "comparative causation."¹³⁹

Another approach, suggested by Professor Thode, is "comparative risk analysis"—to compare the risks of harm to the plaintiff and others created by defendant's conduct (or product) with the risks of harm to the plaintiff and others created by the plaintiff's faulty conduct.¹⁴⁰ While similar to section 2(b) of the Uniform Act,¹⁴¹ comparative risk analysis is an outgrowth of the "duty-risk" approach to tort analysis which essentially precludes a jury from deciding policy questions such as legal or proximate cause.¹⁴² By contrast, the Uniform Act allows the jury to consider causality along with the nature of the conduct of the alleged tortfeasors.¹⁴³ The Maine statute¹⁴⁴ and the English Law Reform (Contributory Negligence) Act 1945¹⁴⁵ go even further and permit reducing a claimant's recovery to such an extent as the factfinder "thinks just and equitable having regard to the claimant's share in the responsibility of the damage."¹⁴⁶ The proposed Federal Uniform Product Liability Act¹⁴⁷ adopts "comparative responsibility" for products liability cases but does not provide any guidelines or instructions for fault comparison.

B. Multiple or Single Actions and Joinder of Parties

The mandate in section four of the Indiana Act to consider the fault of all persons whose fault proximately caused damages raises the ques-

of persons endangered and the potential seriousness of the injury, (3) the significance of what the actor was seeking to attain by his conduct, (4) the actor's superior or inferior capacities, and (5) the particular circumstances, such as the existence of an emergency requiring a hasty decision.

Id. In addressing the causal component of fault comparison, the comment continues: "In determining the relative fault of the parties, the fact-finder will also give consideration to the relative closeness of the causal relationship of the negligence [fault] of the defendants and the harm to the plaintiff. Degrees of fault and proximity of causation are inextricably mixed. . . ." *Id.*

¹³⁹In the case of concurrent "but for" causes, little rational basis exists to quantify or apportion causes except by drawing a 50-50 comparison. See, e.g., Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 Mo. L. REV. 431, 444-47 (1978); Thode, *Some Thoughts on the Use of Comparisons in Product Liability Cases*, 1981 UTAH L. REV. 3, 7.

¹⁴⁰See Thode, *supra* note 139, at 11.

¹⁴¹*Id.* at 9, n.23 ("The Uniform Comparative Fault Act . . . supports the risk comparison test."). See *supra* note 138 (listing factors, including the risk).

¹⁴²Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1 (1977).

¹⁴³UNIF. COMPARATIVE FAULT ACT, *supra* note 3, at § 2(b).

¹⁴⁴ME. REV. STAT. ANN. tit. 14 § 156 (1980).

¹⁴⁵See J. FLEMING, *THE LAW OF TORTS* 245 (6th ed. 1983).

¹⁴⁶*Id.*; see also ME. REV. STAT. ANN. tit. 14 § 156 (1980).

¹⁴⁷S. 44, 98th Cong., 1st Sess. (1983).

tion of whether all causes of action arising from the injurious event must be litigated at once. The Kansas Supreme Court has held that comparative negligence principles and the procedural requisites of the Kansas statute¹⁴⁸ bar a plaintiff from bringing a subsequent suit against a tortfeasor not sued in the initial action even if the defendant in the subsequent action could not have been formally joined or held legally responsible in the initial suit.¹⁴⁹ This result elevates judicial economy above the right to due process at the expense of plaintiffs. A provision expressly permitting subsequent actions against tortfeasors who could not be sued in the first lawsuit would avoid the extreme results reached in Kansas.

The possibility of multiple actions suggests incorporating a permissive or compulsory joinder provision into the Indiana Act.¹⁵⁰ If the fault of absent tortfeasors must be litigated in the first suit why not permit or require joinder by any party to bind as many persons as possible and avoid subsequent litigation?¹⁵¹ A few comparative negligence acts address the joinder issue.¹⁵²

C. Burden of Proof

Some comparative negligence acts also treat burden of proof.¹⁵³ Logically, the burden of pleading and proving the plaintiff's contributory fault should rest with the defendant. But who should bear the burden of production and persuasion with respect to the fault of nonparty tortfeasors? Without proportional apportionment of the fault shares of absent parties and insolvent parties among plaintiffs and defendants, the proportionate individual liability feature of the Indiana Act will diminish the plaintiff's recovery if fault is assessed against nonparties. The defendant should bear the burden of proof as to nonparties because the plaintiff has no incentive to prove the fault of absent tortfeasors. The 1984 amendments to the Indiana Act adopted this approach. Section 10(b) provides that the burden of proof of a nonparty defense is upon the defendant, who must affirmatively plead the defense.¹⁵⁴ If nonparty fault is allocated among all parties to achieve fair apportionment, neither the plaintiff nor the defendant has any particular incentive to establish a nonparty's

¹⁴⁸KAN. STAT. ANN. § 60-258a (1976).

¹⁴⁹Albertson v. Volkswagenwerk A.G., 230 Kan. 368, 634 P.2d 1127 (1981); see also Eurich v. Alkire, 224 Kan. 236, 579 P.2d 1207 (1978).

¹⁵⁰Presently Indiana does not allow third-party actions for contribution and indemnity. See *supra* notes 79, 86. Further, under existing law a plaintiff may sue one or more of several joint tortfeasors, or all, at plaintiff's election. See *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N.E. 956 (1892); *City of Indianapolis v. Walker*, 132 Ind. App. 283, 168 N.E.2d 228 (1960); IND. RULES TR. P. 19(E)(1).

¹⁵¹See *supra* note 58 and accompanying text.

¹⁵²See McConnell, *Comparative Negligence: Coping With the Changes*, 25 TRIAL LAW. GUIDE 526 (1981).

¹⁵³*Id.* at 527.

¹⁵⁴IND. CODE § 34-4-33-10(b) (Supp. 1984).

liability and any rule on burden of proof relating to absent tortfeasors would be completely arbitrary. This result further demonstrates the inherent drawbacks of considering the fault of nonparties and engaging in a fictionalized trial of phantom defendants.¹⁵⁵

IV. CONCLUSION

The concept of liability in proportion to fault is inherent to any approach to comparative fault. As the Supreme Court of California wrote in *Li v. Yellow Cab Co.*,¹⁵⁶ "[I]n a system in which liability is based on fault, the extent of fault should govern the extent of liability."¹⁵⁷ When both the plaintiff and the defendant are at fault the logic and fairness of the principle of proportionate responsibility ineluctably require that all parties to the action, plaintiffs and defendants, should share the damages attributable to absent tortfeasors and insolvent parties in proportion to their percentages of fault. The Uniform Act achieves the goal of fairly apportioning liability according to the extent of fault by: (1) adopting the pure form of comparative fault; (2) leaving nonparties out of the apportionment process; (3) retaining joint and several liability but allocating the burden of insolvency among parties at fault; and (4) providing for comparative contribution. The Indiana Act fails to mete out liability in proportion to fault and creates inequity by: (1) adopting the modified form of comparative fault; (2) litigating the liability of nonparties; (3) providing for proportionate individual liability; and (4) not including actions based upon strict tort liability, products liability, and breach of warranty. The plaintiff (the party who has been injured) shoulders a disproportionate share of the losses whenever the plaintiff's fault exceeds fifty percent of the total fault and whenever a portion of the damages was caused by an absent or insolvent tortfeasor. In addition, the Indiana Act creates a number of difficult questions concerning the fault-free plaintiff, settlement, set-off, last clear chance, imputed negligence, punitive damages, worker's compensation, basis for comparison, burden of proof, multiple actions, and joinder of parties without providing any guidance to possible answers. Some of these topics raise complex issues, but the complexities of comparative fault cannot be avoided by being ignored. The Uniform Act attempts to resolve the significant issues in comparative fault in a balanced and just manner and identifies those areas such as worker's compensation and immunities, which merit additional attention. Unlike the Indiana Act, the Uniform Act offers a unitary and cohesive approach to comparative fault that works and is free from the internal complexities and conflicts born by legislative compromise on each individual feature of comparative fault. Given the in-

¹⁵⁵See *supra* notes 55-60 and accompanying text.

¹⁵⁶13 Cal. 2d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

¹⁵⁷*Id.* at 811, 532 P.2d at 1231, 119 Cal. Rptr. at 863.

tricacies inherent in comparative fault, the Uniform Act should be the first choice among legislatures.¹⁵⁸ If it is necessary for political reasons to accept the Indiana Act's provisions for modified comparative fault, litigating the fault of nonparties, and proportionate individual liability, fairness compels proportional allocation of the fault of absent tortfeasors and insolvent parties among all parties to the action.

¹⁵⁸See, e.g., *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983) (judicial adoption of the Uniform Act); Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Courts*, 30 HASTINGS L.J. 1464, 1510-12 (1979) (advocating adoption of the Uniform Act). McNichols, *supra* note 12, at 279-80 (advocating that the Oklahoma legislature reconsider existing legislation and adopt the Uniform Act or a similar comprehensive statute); Miller, *supra* note 16 (arguing in favor of adoption of the Uniform Act).

Comparative Fault and Product Liability in Indiana

HENRY WOODS*

I. INTRODUCTION

Dean Prosser called the development of modern product liability law “the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts.”¹ Section 402A of the Restatement of Torts² was promulgated less than twenty years ago. In two decades it has received almost universal approval either judicially or legislatively. When this development is coupled with the warranty provisions of the Uniform Commercial Code,³ it is easy to agree with one commentator that the law has come full circle to the old civil law maxim of *caveat venditor* (let the seller beware) from the common law maxim of *caveat emptor* (let the buyer beware).⁴

Apparently, the relatively sudden shift in the theory of manufacturer's liability was designed by its authors to provide long-sought protection against dangerous and defective products for an increasingly vulnerable consumer—a consumer caught in a sometimes vicious commercial vortex born of a massive modern technocracy and generated by a super-mechanized, computer-controlled, assembly-automated, planned-obsoletized, profit-motivated, mass-marketed, over-advertised, ultra-depersonalized economy.⁵

Contemporaneously with the uprooting of long-established precedent in the field of product liability has come a surge to adopt comparative fault. Prior to 1969, only four states had accepted this doctrine. They were Mississippi (1910), Georgia (1913), Wisconsin (1931) and Arkansas (1955).⁶ Indiana has now become the fortieth state to adopt comparative fault.⁷ This change in basic tort law has been made both legislatively and judicially. Without any additional complications, the massive discard of long-established precedent in product liability law would present problems

*United States District Judge, Eastern District of Arkansas.

¹Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 793-94 (1966) (footnote omitted).

²RESTATEMENT (SECOND) OF TORTS § 402A (1965).

³See U.C.C. §§ 2-312 to -315 (1978).

⁴Leavell, *The Return of Caveat Venditor as the Law of Products Liability*, 23 ARK. L. REV. 355, 356 (1969) (footnote omitted).

⁵*Id.* at 356.

⁶See H. WOODS, COMPARATIVE FAULT § 1.11 (1978); Nebraska (1913) and South Dakota (1941) had enacted very limited forms of comparative negligence.

⁷See Act of Apr. 21, 1983, Pub. L. No. 317-1983, 1983 Ind. Acts 1930 (codified at IND. CODE §§ 34-4-33-1 to -8 (Supp. 1983)), amended by Act of Mar. 5, 1984, Pub. L. No. 174-1984, 1984 Ind. Acts 1468 (codified at IND. CODE §§ 34-4-33-1 to -13 (Supp. 1984)).

to the judicial establishment. When the revolution in product liability is added to the uncertainty created by comparative fault, the resolution of many cases becomes—in the words of the King of Siam—a puzzlement.

Five theories of liability are employed in product liability cases: (1) negligence; (2) strict liability in tort; (3) implied warranty; (4) express warranty; and (5) deceit. It is appropriate at this point to review each theory briefly.

II. PRODUCT NEGLIGENCE CASES

For almost a century, product cases based on negligence were restrained by the privity defense, as enunciated in *Winterbottom v. Wright*,⁸ which required contractual privity between plaintiff and supplier. Even a legal neophyte knows that Judge Cardozo struck down the privity defense in negligence cases in *MacPherson v. Buick Motor Co.*⁹ While the process required fifty years, every American jurisdiction has now accepted the *MacPherson* rule, and privity is no longer a problem in product cases based on negligence. The theory alleged is generally negligence in design, selection of materials, assembly, inspection, testing, packaging or warning. Because of practical problems of proof, the favorites with plaintiffs are design negligence and failure to warn.

As in other negligent torts, foreseeability of probable injury is an important element in product cases based on negligence. To constitute negligence, an act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him not to do the act or do to it in a more careful manner.¹⁰

When the plaintiff brings a product case in negligence, the effect of the Indiana comparative negligence statute is clear. Because the defenses set out in Section 4 of the Indiana Product Liability Act of 1978¹¹ are applicable only to strict liability in tort,¹² the defenses available in a product case in Indiana based on negligence are those available in any other negligent tort case. Those defenses most frequently claimed are contributory negligence and assumption of risk. However, both of these defenses are included within the definition of "fault" in the new Indiana Comparative

⁸10 M & W 109, 152 Eng. Rep. 402 (1842).

⁹217 N.Y. 382, 111 N.E. 1050 (1916).

¹⁰*Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E.99 (1928). "The concept of actionable negligence is relational because an act is never negligent except in reference to, or toward, some person or legally protected interest." *Hill v. Wilson*, 216 Ark. 179, 183, 224 S.W.2d 797, 800 (1949) (footnote omitted).

¹¹Act of Mar. 10, 1978, Pub. L. No. 141, Sec. 28, § 4, 1978 Ind. Acts 1308, 1309 (codified at IND. CODE § 33-1-1.5-4 (1982)), amended by Act of Apr. 21, 1983, Pub. L. No. 297-1983, Sec. 5, § 4, 1983 Ind. Acts 1814, 1816 - 17 (codified at IND. CODE § 33-1-1.5-4 (Supp. 1984)).

¹²See *id.* § 33-1-1.5-1.

Fault Act¹³ and will defeat recovery only if the plaintiff's fault "is greater than the fault of all persons whose fault proximately contributed to the claimant's damages."¹⁴

III. STRICT LIABILITY IN INDIANA

In 1978 Indiana adopted a statute governing all product liability actions based on negligence or strict liability in tort, but not those based on breach of warranty.¹⁵ Section 1 of the statute was amended in 1983 to make it applicable only to strict liability in tort except with respect to limitations.¹⁶ Section 3 follows closely the language of Section 402A of the Restatement of Torts.¹⁷ Arkansas¹⁸ and Maine¹⁹ are the only other states to adopt this doctrine legislatively instead of judicially; however, the courts in those states had declined judicial adoption. This was not the case in Indiana, where strict liability had been judicially adopted by the court of appeals in 1970²⁰ and by the Indiana Supreme Court in 1973.²¹

In Indiana, as in most jurisdictions, failure to supply adequate warnings is considered a product defect under section 402A.²² "In order for the plaintiff to recover, the defect can be that the product was defectively designed, defectively manufactured, or that the manufacturer failed to supply adequate warnings or instructions as to the dangers associated with its use."²³ This was not made clear in the original Product Liability Act of 1978,²⁴ but the 1983 amendment added a new section 2.5 which contained the following provision:

A product is defective under this chapter if the seller fails to:

- (1) properly package or label the product to give reasonable warnings of danger about the product; or
- (2) give reasonably complete instructions on proper use of the product;

¹³See Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 1, 1984 Ind. Acts 1468, 1468 (codified at IND. CODE § 34-4-33-2(a) (Supp. 1984)).

¹⁴IND. CODE § 34-4-33-4(a) (Supp. 1984).

¹⁵See IND. CODE § 33-1-1.5-1 (1982).

¹⁶See Act of Apr. 21, 1983, Pub. L. No. 297-1983, Sec. 1, § 1, 1983 Ind. Acts 1814, 1814 (codified at IND. CODE § 33-1-1.5-1 (Supp. 1984)).

¹⁷Compare IND. CODE § 33-1-1.5-3 (Supp. 1984) with RESTATEMENT (SECOND) OF TORTS § 402A (1965).

¹⁸ARK. STAT. ANN. § 85-2-318.2 (Supp. 1983).

¹⁹ME. REV. STAT. ANN. tit. 14, § 221 (1979).

²⁰Cornette v. Searjeant Metal Products, 147 Ind. App. 46, 258 N.E.2d 652 (1970).

²¹Ayr-Way Stores, v. Citwood, 261 Ind. 86, 300 N.E.2d 335 (1973).

²²See, e.g., Reliance Ins. Co. v. AL E. & C., Ltd., 539 F.2d 1101 (7th Cir. 1976) (federal diversity case from Indiana).

²³Hoffman v. E. W. Bliss Co., 448 N.E.2d 277, 281 (Ind. 1983) (citations omitted); see also Reliance Ins. Co. v. AL E. & C., Ltd., 539 F.2d 1101 (7th Cir. 1976).

²⁴See IND. CODE §§ 33-1-1.5-2, -3 (1982).

when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.²⁵

Because of the limited definition of "user or consumer" in section 2 of the original Act,²⁶ there was a question as to whether third parties²⁷ and bystanders²⁸ had the same protection under the statute as formerly afforded by Indiana case law.²⁹ This omission was corrected in the 1983 amendment by the inclusion of "bystander" in the definition of "user" or "consumer" contained in section 2.³⁰

The defenses to strict liability in tort are defined in section 4 of the product liability statute as (1) assumption of risk, (2) misuse not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party, (3) modification or alteration after delivery to the initial user or consumer where not reasonably expectable by the seller, and (4) conformation to the state of the art at the time of design, labeling, packaging and manufacture.³¹ Since these defenses are only applicable to strict liability actions,³² the Indiana common law defenses to negligence actions are unaffected by the product liability statute.³³

Because the statute did not apply to a cause of action accruing before June 1, 1978, very few interpretive cases have reached the Indiana appellate courts. Probably the most important decision to date is *Dague v. Piper Aircraft Corp.*,³⁴ in which the Indiana Supreme Court, respond-

²⁵Act of Apr. 21, 1983, Pub. L. No. 297-1983, Sec. 3, § 2.5, 1983 Ind. Acts 1814, 1815 (codified at IND. CODE § 33-1-1.5-2.5(b) (Supp. 1984)).

²⁶See IND. CODE § 33-1-1.5-2 (1982).

²⁷See *Reliance Ins. Co. v. AL E. & C., Ltd.*, 539 F.2d 1101 (7th Cir. 1976) (section 402A, by its terminology "person or his property," gives subrogee of a bailee standing to sue).

²⁸See *Gilbert v. Stone City Constr. Co.*, 171 Ind. App. 418, 357 N.E.2d 738 (1976) (bystander who is reasonably foreseeable to supplier of product may recover for injuries caused by defective product).

²⁹Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 241 (1979).

³⁰See IND. CODE § 33-1-1.5-2 (Supp. 1984).

³¹*Id.* § 33-1-1.5-4(a) (Supp. 1984).

³²*Id.* § 33-1-1.5-1.

³³A statute of limitations built into the original products act provided that the action must be brought within two years after accrual or within ten years after delivery of the product and did not mention any theory of liability. See IND. CODE § 33-1-1.5-5 (1982).

The 1983 amendment to the products liability statute amended this section to apply to the strict liability and negligence theories of recovery. Act of Apr. 21, 1983, Pub. L. No. 297-1983, Sec. 6, § 5, 1983 Ind. Acts 1814, 1817-18 (codified at IND. CODE § 33-1-1.5-5 (Supp. 1984)). This is the only section of the act as amended that applies to the negligence theory. IND. CODE § 33-1-1.5-1 (Supp. 1984). If the cause of action accrues more than eight years but not more than ten years after initial delivery, it may be commenced within two years after accrual. *Id.* § 33-1-1.5-5.

³⁴418 N.E.2d 207 (Ind. 1981).

ing to four certified questions by the United States Court of Appeals for the Seventh Circuit, upheld the constitutionality of the product liability statute under the Indiana Constitution.³⁵ The Seventh Circuit was principally concerned with the statute of limitations question. In *Dague*, plaintiff's decedent was killed July 7, 1978, in a plane crash. His widow sued October 1, 1979, claiming defects in the manufacture of the aircraft, which was placed in the stream of commerce in 1965. The Indiana Supreme Court held that the action was barred.³⁶ Judge Pivarnik's decision applied the ten-year limitation to the plaintiff's theory that Piper had negligently breached a continuing duty to warn. "The Product Liability Act expressly applies to all product liability actions sounding in tort, including those based upon the theory of negligence, and the legislature clearly intended that *no* cause of action would exist on any such product liability theory after ten years."³⁷

Indiana decisions before the adoption of the Product Liability Act required that the defective article be placed in the stream of commerce. "Stream of commerce" was not included in the original Product Liability Act but appears now in section 3 by the 1983 amendment.³⁸ "The word 'sells' as contained in the text of § 402A is merely descriptive, and the product need not be actually sold if it has been injected into the stream of commerce by other means."³⁹ This expansive interpretation of "sells" was narrowed somewhat by *Petroski v. Northern Indiana Public Service Co.*,⁴⁰ where the court refused to apply section 402A in a case where a child touched a high voltage line.⁴¹ The rationale that the electricity was still in the defendant's power lines and thus not in the "stream of commerce" has been criticized.⁴²

Other areas of settled strict liability law remain unaffected by the product liability statute, but will be profoundly affected when the new comparative fault law becomes effective. Contributory negligence was not a defense under the Product Liability Act in a strict tort liability claim;⁴³ neither was it a defense under Indiana strict liability decisions.⁴⁴ Assump-

³⁵*Id.* at 213. The products statute has also been upheld under the fourteenth amendment of the United States Constitution. *Scalf v. Berkel, Inc.*, 448 N.E.2d 1201 (Ind. Ct. App. 1983).

³⁶418 N.E.2d at 211.

³⁷*Id.* at 212; *see also* *Wojcik v. Almase*, 451 N.E.2d 336 (Ind. Ct. App. 1983).

³⁸*See* IND. CODE § 33-1-1.5-3 (Supp. 1984).

³⁹*Link v. Sun Oil Co.*, 160 Ind. App. 310, 316, 1984 312 N.E.2d 126, 130 (1974).

⁴⁰171 Ind. App. 14, 354 N.E.2d 736 (1976).

⁴¹*Id.* at 30-31, 354 N.E.2d at 744.

⁴²*See* Vargo, *Products Liability, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 202, 208-09 (1978).

⁴³*See* IND. CODE § 33-1-1.5-4 (Supp. 1983).

⁴⁴*See* *Perfection Paint & Color Co. v. Konduris*, 147 Ind. App. 106, 118-19, 258 N.E.2d 681, 689 (1970).

tion of risk was a defense in product cases grounded in either negligence or strict liability,⁴⁵ and continues to be a defense under the product liability statute.⁴⁶ Contributory negligence and assumption of risk⁴⁷ under the new Comparative Fault Act will not necessarily defeat a product liability claim grounded in negligence. If the action is grounded in strict liability, the Product Liability Act of 1978 will apply.⁴⁸

A. Defenses to Strict Liability

There are five basic defenses to a claim founded on strict liability, which should be examined in light of the new statutes.

1. *Assumption of Risk*.—Prior to the adoption of strict liability in Indiana, whether the plaintiff's conduct was characterized as contributory negligence or assumption of risk in a product case made little difference. Either characterization, if proved, would defeat the claim, particularly one based on negligence. While a warranty claim might have survived proof of contributory negligence, there were other hurdles.⁴⁹ After strict liability was adopted, the distinction became vital.⁵⁰ If the plaintiff's conduct was denominated contributory negligence, the defense was unavailable in a strict liability action; however, if plaintiff assumed the risk, his strict liability claim would be completely defeated. The assumption of risk defense was carried over from Indiana strict liability cases to subsection 4(b)(1) of the Product Liability Act.⁵¹ The language used in this subsection closely parallels comment n to 402A.⁵²

⁴⁵*Id.* See also *Petroski*, 171 Ind. App. 14, 354 N.E.2d 736; *Gilbert v. Stone City Constr. Co.*, 171 Ind. App. 418, 357 N.E.2d 738 (1976).

⁴⁶See IND. CODE § 33-1-1.5-4(b)(1) (Supp. 1984).

⁴⁷The terms "incurred risk" and "assumption of risk" are both used in the new Comparative Fault Act. Many of the cases use the terms interchangeably. In the comment to Indiana Pattern Jury Instruction 5.61 it is said that "assumption of risk" applies where contractual relations exist and the doctrine of "incurred risk" applies where the relationship is noncontractual. In product cases this distinction could result in much confusion. Product cases and section 402A of the Restatement generally use the term "assumption of risk," which is used for the most part in this article. This does not do violence to the comment to Pattern Jury Instruction 5.61 since most litigation arises as a result of the sale of a product.

⁴⁸For a discussion of the problems that may arise when a plaintiff brings his action under both strict liability and negligence theory see *infra* notes 215-232 and accompanying text.

⁴⁹See *infra* notes 132-154 and accompanying text.

⁵⁰This point was clearly made by the court of appeals in *Kroger Co. v. Haun*, 177 Ind. App. 403, 379 N.E.2d 1004 (1978).

⁵¹See IND. CODE § 33-1-1.5-4(b)(1) (Supp. 1984): "It is a defense that the user or consumer bringing the action knew of the defect and was aware of the danger and nevertheless proceeded unreasonably to make use of the product and was injured by it."

⁵²On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and

Indiana case law has given a broad sweep to this defense. In a duty to warn case, it was observed that "where the danger or potentiality of danger is known or should be known to the user, the duty does not attach."⁵³ The Seventh Circuit Court of Appeals, reviewing Indiana law in a diversity product liability case, concluded that Indiana follows the "open and obvious danger" rule.⁵⁴ "Under Indiana law, a product is not defectively designed where its dangerous properties are patent. . . . obvious dangers are not a basis for liability under section 402A."⁵⁵ On this issue, Indiana has followed the New York case of *Campo v. Schofield*.⁵⁶ The *Campo* rule has now been repudiated in most jurisdictions, including New York.⁵⁷

The difficulty of distinguishing between assumption of risk, at least in its secondary sense, and contributory negligence has been remarked upon by many courts and virtually all commentators.⁵⁸ Indeed, over half of the American jurisdictions have now merged the concepts of contributory negligence and assumption of risk.⁵⁹ Adoption of comparative fault has accelerated this trend in a number of jurisdictions.⁶⁰ Distinguishing between these concepts in Indiana is particularly difficult because the Indiana courts have used contributory negligence terminology to define assumption of risk.⁶¹ The definitional confusion in the Indiana

is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965).

⁵³*Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820, 825 (Ind. Ct. App. 1975) (citations omitted), *rev'd on other grounds*, 265 Ind. 457, 358 N.E.2d 974 (1976).

⁵⁴*Burton v. L.O. Smith Foundry Products Co.*, 529 F.2d 108 (7th Cir. 1976).

⁵⁵*Id.* at 112.

⁵⁶301 N.Y. 468, 95 N.E.2d 802 (1950). For a full history of the *Campo* rule in the Indiana courts, see Vargo, *Products Liability, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 265, 280, n.61 (1976).

⁵⁷H. WOODS, *COMPARATIVE FAULT* § 14:32 (1978). Typical is the statement of the Colorado Court of Appeals in *Pust v. Union Supply*, 38 Colo. App. 435, 443, 561 P.2d 355, 362 (1978), *aff'd en banc*, 196 Colo. 192, 583 P.2d 276 (1978):

The "open and obvious" rule of *Campo* has been the subject of frequent and fervent attack by legal commentators . . . and significantly, the rule of *Campo* has recently been expressly disavowed by the New York Court of Appeals, *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 384 N.Y.S.2d 115, 348 N.E.2d 571 (1976). We find *Micallef* and the position taken by the commentators to be persuasive and therefore reject the *Campo* "open and obvious" rule.

38 Colo. App. 435, 443, 561 P.2d 355, 362.

⁵⁸See 2 HARPER & JAMES, *LAW OF TORTS* 1191 (1956). These distinguished scholars have taken the position that except for "express assumption of risk" the term and concept should be abolished because it is only a form of contributory negligence.

⁵⁹H. WOODS, *COMPARATIVE FAULT* §§ 6:1-:11 (1978).

⁶⁰*Id.* § 6:8.

⁶¹For instance, in *Cornette v. Seargeant Metal Products*, 147 Ind. App. 46, 258 N.E.2d 652 (1970), a strict liability case in which section 402A was first adopted by an Indiana

case law was pointed out by Judge Sullivan in *Kroger Co. v. Haun*.⁶² While noting that contributory negligence and assumption of risk are "sometimes virtually indistinguishable", Judge Sullivan, nevertheless, provided an extremely thorough analysis in an attempt to draw a meaningful distinction from the Indiana cases.⁶³

2. *Lack of Foreseeability*.—As noted, foreseeability is part of the definition of negligence.⁶⁴ Taking the position that negligence concepts have no part in strict liability, some courts have rejected the foreseeability requirement in strict liability; others have retained the requirement in even strict liability cases.⁶⁵ Indiana has chosen to follow the latter view.⁶⁶ However, even where foreseeability is made an element of strict liability, it is not the foreseeability defined in negligence cases but rather foreseeability limited as to the use of the product. The United States Court of Appeals for the Third Circuit has made this point effectively:

The use of foreseeability in the court's instructions here does not reflect this limitation . . . [I]t subverted the intention of § 402A by permitting a vendor to avoid liability on the basis of being unable to anticipate the precise manner in which the injury occurred.

. . . .

Similarly, the use of foreseeability by the trial court with reference to the "foreseeability" of injury or harm is improper, for it is foreseeability as to the use of the product which establishes the limits of the seller's responsibility.⁶⁷

state court, the following definition of assumption of risk was given from an earlier negligence case:

The doctrine of assumed or incurred risk " . . . is based upon the proposition that one incurs all the ordinary and usual risks of an act upon which he voluntarily enters, so long as those risks are known and understood by him, or could be readily discernible by a reasonable and prudent man under like or similar circumstances." *Stallings et al. v. Dick*, 139 Ind. App. 118, 129, 210 N.E.2d 82, 88 (1966), (Transfer denied).

147 Ind. App. at 54, 258 N.E.2d at 657.

⁶²177 Ind. App. 403, 379 N.E.2d 1004 (1978).

⁶³In summary, Judge Sullivan concluded that assumption of risk applies when the plaintiff comes upon a risk or danger caused by defendant's negligence, knows of and appreciates its magnitude, but nevertheless accepts it voluntarily. The plaintiff is contributorily negligent when his conduct fails to conform to that of a reasonable person under similar circumstances. "Thus, where plaintiff's conduct has been voluntary and knowing as well as unreasonable, courts and commentators have observed that the two defenses overlap and are sometimes virtually indistinguishable." *Id.* at 416, 379 N.E.2d at 1012 (citations omitted).

⁶⁴*See supra* note 10 and accompanying text.

⁶⁵The rationale supporting these two views is well-explicated by United States District Judge Eschbach in *Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776, 781 (N.D. Ind. 1969).

⁶⁶*Shanks v. A.F.E. Indus.*, 416 N.E.2d 833 (Ind. 1981); *Chrysler Corp. v. Alumbaugh*, 342 N.E.2d 908 (Ind. Ct. App. 1976); *Gilbert v. Stone City Constr. Co.*, 357 N.E.2d 738 (Ind. Ct. App. 1976).

⁶⁷*Eshbach v. W. T. Grant's & Co.*, 481 F.2d 940, 943 (3d Cir. 1973).

In *Shanks v. A.F.E. Industries, Inc.*,⁶⁸ the Supreme Court of Indiana may well have accepted the view of foreseeability which requires that the defendant must have been able to foresee the precise manner in which the injury occurred, the view rejected by the Third Circuit, and by most other jurisdictions.⁶⁹

Another typical case is *Conder v. Hull Truck Lift, Inc.*⁷⁰ In *Conder*, the injured employee-operator of a forklift sued its lessor for injury sustained when the forklift overturned. It was undisputed that the accident occurred because of a maladjusted carburetor which made the forklift defective. Shortly before the accident the carburetor had malfunctioned with two other employees, including a foreman, which fact was not reported to the lessor or to the plaintiff. The court held that the jury could properly find an unforeseeable intervening proximate cause. Significantly, the court defined proximate cause as containing the necessary element of foreseeability.⁷¹ This is contrary to most authorities, who hold foreseeability to be an element in standard of care but not proximate cause.⁷²

The holding in *Conder* may be contrasted with *Rhoads v. Service Machine Co.*,⁷³ a decision from the United States District Court of Arkansas. In *Rhoads*, plaintiff-employee lost her arm in a power press and sued the manufacturer. The press was supposed to have had controls as a safety device, but they had not been activated by the purchaser-employer. The duty of affixing these controls had been delegated to plaintiff's employer. The trial judge refused to set aside a verdict for the plaintiff, holding that

where the occurrence of the intervening cause is foreseeable to the original actor or where his conduct substantially increases the likelihood of the occurrence of the intervening cause, the original conduct, if negligent, is still considered to be a "proximate cause" of the injury, and the original actor remains liable for the ultimate consequences of his negligence.⁷⁴

⁶⁸416 N.E.2d 833 (Ind. 1981).

⁶⁹The Indiana Supreme Court stated: "Unquestionably, the facts and evidence supporting Shanks' theory reveal the development of a situation which was especially unforeseeable to A.F.E." *Id.* at 838 (citation omitted). This language sounds as though the court rejected liability because the precise manner in which the plaintiff was injured could not have been foreseen by the defendant before the accident occurred, an approach that has not been generally accepted. See Vargo, *Products Liability, Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 289, 296-97 (1982).

⁷⁰435 N.E.2d 10 (Ind. 1982).

⁷¹*Id.* at 14.

⁷²*Compare* RESTATEMENT (SECOND) OF TORTS § 289 (1965) with *id.* § 435; see *Collier v. Citizens Coach Co.*, 231 Ark. 489, 330 S.W.2d 74 (1959). The Indiana Pattern Jury Instructions do not include foreseeability in the definition of proximate cause. Indiana Pattern Jury Instructions § 5.81 (1968).

⁷³329 F Supp. 367 (E.D. Ark. 1971).

⁷⁴*Id.* at 374 (citations omitted).

The inhibiting influence of foreseeability in Indiana product liability cases is demonstrated by the history of *Evans v. General Motors Corp.*⁷⁵ *Evans* was an Indiana diversity case and one of the early "second impact" or "enhanced injury" cases. Plaintiff claimed that her decedent was killed in a broadside collision because of the failure of the automobile manufacturer to equip its product with side rails. The Seventh Circuit Court of Appeals affirmed a dismissal of the case: "The intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur."⁷⁶ At about the same time, the Eighth Circuit Court of Appeals reached the opposite result in *Larsen v. General Motors Corp.*⁷⁷ *Larsen* has been followed almost universally, in contrast to *Evans*, which found favor only in Indiana, Mississippi, and West Virginia. As noted by the Seventh Circuit, when later overruling *Evans* in *Huff v. White Motor Co.*:⁷⁸

One who is injured as a result of a mechanical defect in a motor vehicle should be protected under the doctrine of strict liability even though the defect was not the cause of the collision which precipitated the injury. There is no rational basis for limiting the manufacturer's liability to those instances where a structural defect has caused the collision and resulting injury. This is so because even if a collision is not caused by a structural defect, a collision may precipitate the malfunction of a defective part and cause injury. In that circumstance the collision, the defect, and the injury are interdependent and should be viewed as a combined event. Such an event is the foreseeable risk that a manufacturer should assume. Since collisions for whatever cause are foreseeable events, the scope of liability should be commensurate with the scope of the foreseeable risks.⁷⁹

Like *Evans*, *Huff* arose out of Indiana and the court was bound by Indiana law. The change in result was attributed mainly to Indiana's adoption of strict liability in tort.⁸⁰ Some of the problems found in these cases derive from a confusion of the concepts "unintended" and "unforeseeable." It may not be intended that an automobile will become involved in a collision but it is certainly foreseeable that this will happen.⁸¹ It makes little sense to deny recovery to the housewife who splashed clean-

⁷⁵359 F.2d 822 (7th Cir.), cert. denied, 385 U.S. 836 (1966), overruled in *Huff v. White Motor Co.*, 565 F.2d 104 (7th Cir. 1977).

⁷⁶359 F.2d at 825.

⁷⁷391 F.2d 495 (8th Cir. 1968).

⁷⁸565 F.2d 104 (7th Cir. 1977).

⁷⁹*Id.* at 109.

⁸⁰*Id.* at 106.

⁸¹See *supra* text accompanying note 79.

ing fluid in her eye for the reason that "the cleansing preparation was not intended for use in the eye."⁸²

The recent amendment to the Product Liability Act⁸³ perhaps made some changes in the role of foreseeability in Indiana product liability law. The first sentence of Subsection 4(b)(2) of the Product Liability Act of 1978 is amended to read as follows: "It is a defense that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party."⁸⁴ This sentence formerly read: "It is a defense that a cause of the physical harm is a nonforeseeable misuse of the product by the claimant or any other person."⁸⁵

Subsection 4(b)(3) formerly read: "It is a defense that a cause of the physical harm is a nonforeseeable modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of physical harm."⁸⁶ This subsection now reads:

It is a defense that a cause of the physical harm is a modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of physical harm where such modification or alteration is not reasonably expectable to the seller.⁸⁷

An entirely new section 2.5 is inserted.⁸⁸ Subsections (a), (c), and (d) in the new section read as follows:

(a) A product is in a defective condition under this chapter if, at the time it is conveyed by the seller to another party, it is in a condition:

(1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and

(2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.

⁸²*Sawyer v. Pine Oil Sales Co.*, 155 F.2d 855, 856 (5th Cir. 1946).

⁸³See Act of Apr. 21, 1983, Pub. L. No. 297-1983, 1983 Ind. Acts 1814 (codified at IND. CODE § 33-1-1.5-1 to -5 (Supp. 1984)).

⁸⁴IND. CODE § 33-1-1.5-4(b)(2) (Supp. 1984).

⁸⁵IND. CODE § 33-1-1.5-4(b)(2) (1982).

⁸⁶*Id.* § 33-1-1.5-4(b)(3).

⁸⁷*Id.* § 33-1-1.5-4(b)(3) (Supp. 1984).

⁸⁸Act of Apr. 21, 1983, Pub. L. No. 297-1983, Sec. 3, § 2.5, 1983 Ind. Acts 1814, 1815-16 (codified at IND. CODE § 33-1-1.5-2.5 (Supp. 1984)).

. . . .
(c) A product is not defective under this chapter if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under this chapter.

(d) A product is not defective under this chapter if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.⁸⁹

Significantly, the term "foreseeable" is avoided and the term "reasonably expectable" is substituted in the above sections. These amendments to the Product Liability Act may inspire a fresh look at the concept of foreseeability in strict liability cases by the Indiana courts. "Non-foreseeable" and "unforeseeable" have not been defined in Indiana as the equivalent of "not reasonably expectable," although there is evidence that the legislative intent was to make these terms synonymous.⁹⁰

3. *Misuse*.—Section 4 of the Product Liability Act of 1978 makes it a defense to a strict liability claim "that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party."⁹¹ Presumably, this means that when an automobile racer buys an automobile tire for ordinary use and installs it on his racing car, he cannot complain when it blows out during an automobile race.⁹² Nor can a plaintiff complain when "the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap"⁹³ Failure to use a guard on a grinding wheel has been held to be conduct that would justify the submission of the "misuse" defense to the jury.⁹⁴ Plaintiff argued that such failure only constituted contributory negligence and would not be a defense to a strict liability or warranty claim based on injury from disintegration of the grinding wheel.⁹⁵

"Misuse" as a defense to strict liability was considered thoroughly by the Indiana Court of Appeals in *Fruehauf Trailer Division v. Thornton*.⁹⁶ In that case a truck driver sued a tire manufacturer for injuries sustained when a tire blew out, causing the truck to overturn. The defendant claimed that the plaintiff drove an excessive distance after the

⁸⁹IND. CODE § 33-1-1.5-2.5(a), (c), (d) (Supp. 1984).

⁹⁰See Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 282 (1984).

⁹¹IND. CODE § 33-1-1.5-4(b)(2) (Supp. 1984).

⁹²RESTATEMENT (SECOND) OF TORTS § 395 comment j, illustration 3 (1965).

⁹³*Id.* § 402(A) comment h.

⁹⁴*McGrath v. Wallace Murray Corp.*, 496 F.2d 299 (10th Cir. 1974).

⁹⁵*Id.* at 302-03 n.6.

⁹⁶174 Ind. App. 1, 366 N.E.2d 21 (1977).

blowout and that it was therefore entitled to an instruction on misuse. The trial court instructed on contributory negligence and not misuse. On appeal, the manufacturer claimed that "if there was evidence to support an instruction on contributory negligence, there was evidence—the same evidence—to support a misuse instruction."⁹⁷ The court distinguished the two concepts: "Since misuse involves a subjective determination of continuing conduct in the presence of a known defect, and contributory negligence presumes an objective determination of failure to find or guard against a defect when a duty to do so is present, the two concepts are mutually distinguishable."⁹⁸ The court went on to hold that since there was insufficient evidence to show that plaintiff voluntarily continued to drive on the defective tire after the blowout, the misuse instruction was properly refused.⁹⁹

The distinction between contributory negligence and misuse is presently of great importance under Indiana law. The former is not a defense to a strict liability claim; the latter is a complete defense. In *Hoffman v. E.W. Bliss Co.*,¹⁰⁰ a power press double-tripped and crushed the plaintiff's hand. The jury was instructed as follows: "'If you find that the plaintiff was . . . inadequately instructed . . . this would constitute a misuse of the equipment and be a complete defense. . . .'"¹⁰¹ The Indiana Supreme Court found this instruction to be an error since

it is use in a manner contrary to legally sufficient instructions that is misuse. It defies logic to hold a user has misused a product when its danger is not open and obvious and moreover no one has warned the user of the presence of a latent danger associated with the product's use.¹⁰²

The importance of the distinction between misuse and contributory negligence will remain after the new Comparative Fault Act becomes effective on January 1, 1985,¹⁰³ since Senate Bill Number 419 of 1984 eliminated product misuse from the definition of fault in the Indiana Comparative Fault Act.¹⁰⁴ Misuse remains as a defense to strict liability in the Product Liability Act of 1978.¹⁰⁵

4. Modification or Alteration.—Another defense to strict liability contained in the Product Liability Act of 1978 is "a modification or alteration of the product made by any person after its delivery to the initial

⁹⁷*Id.* at 10, 366 N.E.2d at 29.

⁹⁸*Id.* at 11, 366 N.E.2d at 29.

⁹⁹*Id.* at 12, 366 N.E.2d at 30.

¹⁰⁰448 N.E.2d 277 (Ind. 1983).

¹⁰¹*Id.* at 281 (quoting the trial court's instructions).

¹⁰²*Id.* at 283.

¹⁰³See Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 3, 1983 Ind. Acts. 1930, 1933 (codified at IND. CODE § 34-4-33-3 (Supp. 1984)).

¹⁰⁴Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2, 1984 Ind. Acts 1468, 1468 (codified at IND. CODE § 33-4-33-2(a) (Supp. 1984)).

¹⁰⁵See IND. CODE § 33-1-1.5-4(b)(2) (Supp. 1984).

user or consumer if such modification or alteration is the proximate cause of physical harm where such modification or alteration is not reasonably expectable to the seller."¹⁰⁶ Apparently, a plaintiff is not barred from recovery if the alteration is reasonably expectable. Comment p to section 402A states that "the mere fact the product is to undergo processing, or other substantial change, will not in all cases relieve the seller of liability under the rule stated in this Section."¹⁰⁷ *Cornette v. Searjeant Metal Products, Inc.*,¹⁰⁸ wherein section 402A was initially adopted in Indiana, involved alteration of a product. The defect in a power press was caused by removal of an air filter after the press left the manufacturer's plant. In *Cornette*, such an alteration exculpated the manufacturer.¹⁰⁹

Another such case is *Conder v. Hull Lift Truck, Inc.*¹¹⁰ where a forklift manufactured by Allis-Chalmers overturned and injured plaintiff. The accident was caused by a maladjusted carburetor. Hull, lessor of the forklift, had converted the fuel system from gasoline to liquid propane gas, dismantling and rebuilding the carburetor with parts involved in the maladjustment. The supreme court held that this was an unforeseeable intervening cause which insulated Allis-Chalmers.¹¹¹

The product liability statute makes one important change from Indiana case law. The burden of proving non-alteration formerly rested on the plaintiff.¹¹² Under the Product Liability Act of 1978, the burden of proving alteration is on the defendant.¹¹³ This is a noteworthy change, as is illustrated by *Craven v. Niagara Machine and Tool Works, Inc.*, a case applying the old standard by placing the burden on the plaintiff.¹¹⁴ Plaintiff's hand was crushed between the ram and the platen of a power press. After the machine was received by plaintiff's employer, a flywheel guard which prevented an operator from using the flywheel to "inch down" the press had been removed. The accident resulted when the operator was "inching" the press down by using the flywheel. The trial court found an unforeseeable alteration and granted judgment for the manufacturer because the defect "was a result of a substantial change in the condition of the product."¹¹⁵ In its first opinion the court of appeals reversed.¹¹⁶ On rehearing, however, the trial court was affirmed because "we failed

¹⁰⁶*Id.* § 33-1-1.5-4(b)(3).

¹⁰⁷RESTATEMENT (SECOND) OF TORTS § 402A comment p (1965).

¹⁰⁸147 Ind. App. 46, 258 N.E.2d 652 (1970).

¹⁰⁹*Id.* at 55, 258 N.E.2d at 657.

¹¹⁰435 N.E.2d 10 (Ind. 1982).

¹¹¹*Id.* at 15.

¹¹²"Specifically, in order to show himself entitled to relief under § 402A (1)(b), *supra*, a plaintiff must carry the burden of proving that no substantial change occurred in the condition of the product in which it was sold." 147 Ind. App. at 54, 258 N.E.2d at 657.

¹¹³IND. CODE § 33-1-1.5-4(a), (b)(3) (Supp. 1984).

¹¹⁴417 N.E.2d 1165 (Ind. Ct. App. 1981); *on reh'g* 425 N.E.2d 654 (Ind. Ct. App. 1981).

¹¹⁵417 N.E.2d at 1168.

¹¹⁶*Id.* at 1172.

to give proper consideration to plaintiff's burden of establishing that no substantial change occurred."¹¹⁷

In Indiana an alteration not reasonably expectable would seem to be a complete defense in a strict liability case. It is not included in the definition of fault contained in the Comparative Fault Act.¹¹⁸ Though arguably affected by the Product Liability Act and the amendments thereto, such decisions as *Cornette* and *Conder* should be unaffected by Indiana's adoption of comparative fault.

5. *State of the Art*.—Section 4(b)(4) of the Product Liability Act reads as follows: "When physical harm is caused by a defective product, it is a defense that the design, manufacture, inspection, packaging, warning, or labeling of the product was in conformity with the generally recognized state of the art at the time the product was designed, manufactured, packaged, and labeled."¹¹⁹

As with modification or alteration, compliance with the state of the art would seem to be a complete defense not subject to comparative fault. With regard to this section the observation of two Indiana commentators is worth noting:

If the term "generally recognized" refers to actual industry practices in use at the time of design or manufacture, the provision would conflict with the generally accepted view that state of the art is only to be judged by what is scientifically and economically feasible, not by comparison with general industry custom.¹²⁰

It is worthy of note that the Indiana courts have held that standards set by an entire industry can be found to be negligent¹²¹ and that the standard of care in negligence law is established independent of custom and usage.¹²²

B. *Strict Liability and Economic Loss*

If a defective tire blows out and causes total loss of plaintiff's car, he can recover. What if, however, he is sold a defective car; can he recover damages for his economic loss from the seller of the car on the basis of strict liability in tort? The New Jersey Supreme Court in *Santor v. A. & M. Karagheusian*¹²³ extended the doctrine of strict liability to a purely economic loss. The plaintiff purchased carpeting that developed a defect. The court held the manufacturer liable for the difference in the price paid for the carpet and its actual market value on the basis of strict liability in tort.¹²⁴

¹¹⁷425 N.E.2d at 655 (Ind. Ct. App. 1981).

¹¹⁸See IND. CODE § 34-4-33-2(a) (Supp. 1984).

¹¹⁹IND. CODE § 33-1-1.5-4(b)(4) (Supp. 1984).

¹²⁰Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 248-49 (1979) (footnote omitted).

¹²¹*Gilbert v. Stone City Constr. Co.*, 171 Ind. App. 418, 429, 357 N.E.2d 738, 745 (1976).

¹²²*Walters v. Kellam & Foley*, 172 Ind. App. 207, 230-31, 360 N.E.2d 199, 214 (1977).

¹²³44 N.J. 52, 207 A.2d 305 (1965).

¹²⁴*Id.* at 68-69, 207 A.2d at 314.

Judge Traynor, then sitting as Chief Justice of the California Supreme Court in *Seely v. White Motor Co.*,¹²⁵ roundly condemned this extension of the doctrine which he had originally expounded. His view was that when economic losses result from commercial transactions, the parties should be relegated to the law of sales:

Although the rules governing warranties complicated resolution of the problems of personal injuries, there is no reason to conclude that they do not meet the "needs of commercial transactions." The law of warranty "grew as a branch of the law of commercial transactions and was primarily aimed at controlling the commercial aspects of these transactions."

Although the rules of warranty frustrate rational compensation for physical injury, they function well in a commercial setting.¹²⁶

The clear majority of jurisdictions follow the view of Judge Traynor and apply the law of sales to commercial transactions.¹²⁷

Both the comparative fault law and the Product Liability Act of 1978 also seem to adopt Judge Traynor's view, since they do not embrace economic loss in any of the definitions contained in section 1(a) of the former¹²⁸ and section 2 of the latter.¹²⁹ The Indiana Supreme Court has previously indicated that it would make no distinction in imposing liability for "economic loss" in contrast to personal injury.¹³⁰ Any doubt regarding economic loss from gradually evolving property damage was dispelled by an amendment to the definition of "physical harm" originally contained in the Product Liability Act of 1978, which now is defined as "bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property. The term does not include gradually evolving damage to property or economic losses from such damage."¹³¹ Without more extensive statutory language, it is unclear how the legislature intended economic loss arising from "sudden major damage to property" to be treated.

¹²⁵63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

¹²⁶*Id.* at 16, 45 Cal. Rptr. at 22, 403 P.2d at 150 (citations omitted).

¹²⁷*Inglis v. American Motors Corp.*, 197 N.E.2d 921 (Ohio Ct. App. 1964), *aff'd*, 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965); *Price v. Gatlin*, 241 Ore. 315, 405 P.2d 502 (1965); *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (1966).

¹²⁸*See* Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 1(a), 1983 Ind. Acts 1930, 1930, (codified at IND. CODE § 34-4-33-1(a) (Supp. 1984)).

¹²⁹*See* IND. CODE § 33-1-1.5-2 (1982).

¹³⁰"The contention that a distinction should be drawn between mere 'economic loss' and personal injury is without merit." *Barnes v. Mac Brown and Co.*, 264 Ind. 227, 230, 342 N.E.2d 619, 621 (1976).

¹³¹Act of Apr. 21, 1983, Pub. L. No. 297-1983, Sec. 2, § 2, 1983 Ind. Acts 1814, 1815 (codified at IND. CODE § 33-1-1.5-2 (Supp. 1984)).

IV. WARRANTY

Indiana adopted the most restrictive of the three proposed alternatives in the Uniform Commercial Code¹³² dealing with privity in the sale of products:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.¹³³

The restrictive effect of this section is illustrated by *Lane v. Barringer*.¹³⁴ Plaintiff's daughter, while shopping with her mother, dropped a bottle of drain cleaner which broke and splashed caustic material on plaintiff's legs. The court upheld dismissal on the ground of lack of privity between the plaintiff and the manufacturer, the supplier of the container, and the distributor.¹³⁵

While there is some language in older Indiana cases that an implied warranty sounding in tort did not require privity, it is clear that such a theory has now merged with strict liability: "Under Indiana law a count based on tortious breach of implied warranty is duplicitous of a count based on strict liability in tort and both counts may not be pursued in the same lawsuit."¹³⁶ Strict liability in the early stages of its development was treated by some courts as a warranty concept.¹³⁷ A tortious breach of warranty in Indiana has now been absorbed by the new doctrine of strict liability in tort and the only implied warranties are the contract warranties as set forth in the Uniform Commercial Code—merchantability¹³⁸ and fitness for a particular purpose¹³⁹—plus the common law warranty of habitability. The Uniform Commercial Code also recognizes express warranties.¹⁴⁰

The contract warranties are not very satisfactory in personal injury product litigation because of several engraftments from the law of sales. Besides the above-mentioned privity problem, there are other serious hurdles. One is the necessity of establishing a sale.¹⁴¹ Another is the re-

¹³²See U.C.C. § 2-318 (1978).

¹³³IND. CODE § 26-1-2-318 (1982).

¹³⁴407 N.E.2d 1173 (Ind. Ct. App. 1980).

¹³⁵*Neofes v. Robertshaw Controls Co.*, 409 F. Supp. 1376, 1379 (S.D. Ind. 1976) (citation omitted).

¹³⁶*Neofes v. Robertshaw Controls Co.*, 409 F. Supp. 1376, 1379 (S.D. Ind. 1976).

¹³⁷See *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960).

¹³⁸IND. CODE § 26-1-2-314 (1982).

¹³⁹*Id.* § 26-1-2-315.

¹⁴⁰*Id.* § 26-1-2-313.

¹⁴¹A lease or bailment for hire is generally held to be a sale. *Cintrone v. Hertz Truck*

quirement of notice of breach of warranty.¹⁴² As Dean Prosser pointed out, the majority of courts (at least under the Uniform Sales Act) have enforced the notice requirement, even in personal injury cases.¹⁴³ "As applied to personal injuries . . . it [the notice requirement] becomes a booby-trap for the unwary."¹⁴⁴ Under the Uniform Commercial Code, both express and implied warranties may be disclaimed if done in a conscionable manner.¹⁴⁵ However, "[l]imitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable"¹⁴⁶

Because of the above considerations, warranties have not been very popular in product cases, particularly since the advent of strict liability. Sometimes the Commercial Code's four-year statute of limitations¹⁴⁷ is advantageous. The plain meaning of the Code would seem to be that the statute begins to run when the seller tenders delivery.¹⁴⁸ Such has been the view of the cases.¹⁴⁹

There is another potential advantage to a warranty product action: Contributory negligence is not a defense to implied or express warranty.¹⁵⁰ "Only more specific forms of plaintiff's misconduct, such as assumption of risk and misuse of the product, may be relied upon by the defendant by way of defense."¹⁵¹

Another type of warranty has importance in Indiana, the warranty of fitness for habitation. In *Theis v. Heuer*,¹⁵² the court held that a warranty of fitness for habitation exists between a builder-vendor and a first purchaser of a dwelling house, and that warranty extends to subsequent purchasers when a latent defect later appears.¹⁵³ This is a common law

Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965). A prospective customer cannot bring an implied warranty action because there has been no sale. *Lasky v. Economy Grocery Stores*, 319 Mass. 224, 65 N.E.2d 305 (1946); *Day v. Grand Union Co.*, 113 N.Y.S.2d 436 (1952). Whether certain transactions are sales or services is a knotty problem. It has been particularly true in the blood bank cases. See the review of these cases in *Russell v. Community Blood Bank*, 185 So.2d 749 (Fla. Dist. Ct. App. 1966), *aff'd*, 196 So. 2d 115 (Fla. 1967).

¹⁴²The Uniform Commercial Code provides that "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy" IND. CODE § 26-1-2-607(3)(a) (1982).

¹⁴³Prosser, *The Assault upon the Citadel: Strict Liability to the Consumer*, 69 YALE L.J. 1099, 1131 n.184 (1966).

¹⁴⁴*Id.* at 1130.

¹⁴⁵IND. CODE § 26-1-2-316 (1982).

¹⁴⁶*Id.* § 26-1-2-719(3).

¹⁴⁷*Id.* § 26-1-2-725.

¹⁴⁸*Id.*

¹⁴⁹*See, e.g., Rufo v. Bastian-Blessing Co.*, 417 Pa. 107, 207 A.2d 823 (1965).

¹⁵⁰*Gregory v. White Truck & Equip. Co.*, 163 Ind. App. 240, 323 N.E.2d 280 (1975).

¹⁵¹*Id.* at 257, 323 N.E.2d at 290.

¹⁵²149 Ind. App. 52, 270 N.E.2d 764 (1971), *opinion adopted*, 280 N.E.2d 300 (Ind. 1972).

¹⁵³*Barnes v. Mac Brown & Co.*, 264 Ind. 227, 342 N.E.2d 619 (1976).

and not a Code warranty; however, it has much in common with the warranty of merchantability in the Uniform Commercial Code and also with strict liability. As one commentator has suggested, "proving that a house is not fit for ordinary purposes should be the same as proving that the house is defective under the strict liability statute."¹⁵⁴

V. FRAUD AND DECEIT

To maintain a cause of action for deceit, the plaintiff must prove an intentional representation by the defendant of a material fact, which representation was known by the defendant to have been false, and which was relied on by the plaintiff to his detriment.¹⁵⁵ Although there is no privity requirement in product cases where the supplier concealed knowledge of the danger, this high standard of proof is difficult to meet, and most plaintiffs prefer to ground their actions in strict liability or warranty. By statute, the remedies for fraud include all remedies for the non-fraudulent breach of warranty.¹⁵⁶ Since fraud and deceit are intentional torts, they are excluded from the operation of the Indiana Comparative Fault Act.¹⁵⁷ Contributory negligence is not a defense to a product case based on fraud and deceit. Finally, many of these cases involve a prayer for equitable relief.¹⁵⁸

VI. INDEMNITY

Section 6 of the Product Liability Act states: "Nothing contained herein shall affect the right of any person found liable to seek and obtain indemnity from any other person whose actual fault caused a product to be defective."¹⁵⁹ Section 7 of the new Indiana Comparative Fault Act maintains this status: "In an action under this chapter, there is no right of contribution among tortfeasors. However, this section does not affect any rights of indemnity."¹⁶⁰ Thus, the Indiana law of indemnity remains intact and unaffected by these statutes.

The Indiana law of indemnity and contribution was thoroughly reviewed by United States District Court Judge S. Hugh Dillin in *McClish v. Niagara Machine & Tool Works*.¹⁶¹ In contrast to contribution, indem-

¹⁵⁴Copeland, *The Implied Warranty of Habitability and the Use of the Uniform Commercial Code by Analogy*, 1983 ARK. L. NOTES 10, 17.

¹⁵⁵*Mercer v. Elliott*, 208 Cal. App. 2d 275, 25 Cal. Rptr. 217 (1962); *Fowler v. Benton*, 229 Md. 571, 185 A.2d 344 (1962); *Lindberg Cadillac Co. v. Aron*, 371 S.W.2d 651 (Mo. Ct. App. 1963); *Haarberg v. Schneider*, 174 Neb. 334, 117 N.W.2d 796 (1962).

¹⁵⁶IND. CODE § 26-1-2-721 (1982).

¹⁵⁷See Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2, 1984 Ind. Acts 1468, 1468 (codified at IND. CODE § 34-4-33-2(a) (Supp. 1984)).

¹⁵⁸See, e.g., *Gentry v. Little Rock Road Mach. Co.*, 232 Ark. 580, 339 S.W.2d 101 (1960).

¹⁵⁹IND. CODE § 33-1-1.5-6 (1982).

¹⁶⁰IND. CODE § 34-4-33-7 (Supp. 1984).

¹⁶¹266 F. Supp. 987 (S.D. Ind. 1967).

nity shifts the entire burden of liability and damage from one party to another. Judge Dillin noted: "In the absence of express contract . . . Indiana follows the general rule that there can be no contribution or indemnity as between joint tort-feasors."¹⁶² Exceptions to the general rule do exist, however, and implied indemnity can be asserted (1) where the indemnitee has only an imputed or vicarious liability for damage caused by the indemnitor;¹⁶³ (2) where one is constructively liable to a third person by operation of some special statute or rule of law which imposes upon him a non-delegable duty, but is otherwise without fault;¹⁶⁴ and (3) where a merchant sells a defective product which harms the ultimate user, he is entitled to indemnity from the manufacturer or supplier.¹⁶⁵

By providing that it will not "affect the right of any person found liable to seek and obtain indemnity from any other person whose actual fault caused a product to be defective,"¹⁶⁶ section 6 of the Product Liability Act seems to be in accord with the third exception. Most courts have allowed indemnity in favor of an innocent retailer who has been held liable for a manufacturing defect.¹⁶⁷

Indiana follows the common law rule that there is *no* contribution among joint tort-feasors.¹⁶⁸ This rule remains unchanged by either the Product Liability Act or the Comparative Fault Act.¹⁶⁹ If the fault of plaintiff and defendant is to be compared, it seems highly illogical not to compare fault among the culpable defendants. Many of the jurisdictions adopting comparative fault have incorporated a contribution system in the comparative fault statute; others have contemporaneously adopted a contribution statute based on proportionate fault.¹⁷⁰

VII. THE INDIANA COMPARATIVE FAULT ACT

A. *Definition of Fault*

The Indiana Comparative Fault Act does not take effect until January 1, 1985, and does not apply to any civil action that accrues before that date.¹⁷¹ Thus, it will be several years before there are definitive interpretations of this Act by the Indiana appellate courts. The Indiana Act is a

¹⁶²*Id.* at 989 (footnotes omitted).

¹⁶³See *Indiana Nitroglycerin & Torpedo Co. v. Lippencoff Glass Co.*, 165 Ind. 361, 75 N.E. 649 (1905); *Biel, Inc. v. Kirsch*, 130 Ind. App. 46, 153 N.E.2d 140 (1958).

¹⁶⁴See *McNaughton v. City of Elkhart*, 85 Ind. 384 (1882).

¹⁶⁵See *Frank R. Jelleff, Inc. v. Pollak Bros.*, 171 F. Supp. 467 (N.D. Ind. 1957).

¹⁶⁶IND. CODE § 33-1-1.5-6 (1982).

¹⁶⁷See, e.g., *Langford v. Chrysler Motors Corp.*, 513 F.2d 1121 (2d Cir. 1975); *Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 179 N.W.2d 64 (1970).

¹⁶⁸See cases cited in *McLish v. Niagara Mach. & Tool Works*, 266 F. Supp. 987, 989 n.5 (S.D. Ind. 1967).

¹⁶⁹See *supra* text accompanying notes 163 & 164.

¹⁷⁰See the text of the various statutes collected in H. WOODS, *COMPARATIVE FAULT* (1978).

¹⁷¹Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 3, 1983 Ind. Acts 1930, 1933.

comparative fault act, in contrast to most similar legislation which speaks in terms of comparative negligence. In fact, the language of the Indiana Act tracks the language of section 1(b) of the Uniform Comparative Fault Act almost exactly.¹⁷² It contains the most comprehensive definition of "fault" contained in any legislation passed to date except statutes in Minnesota¹⁷³ and Washington,¹⁷⁴ which are also modeled on the Uniform Comparative Fault Act, and Arkansas,¹⁷⁵ which furnished the model for the Uniform Act. However, a 1984 amendment removed strict liability, warranty, and product misuse from the definition of "fault" in the Indiana Act.¹⁷⁶ Maine¹⁷⁷ and New York¹⁷⁸ have passed comparative fault acts that are not as comprehensive as those mentioned above. A number of other jurisdictions have adopted comparative fault judicially to some degree; these are Alaska, California, Hawaii, Kansas, Mississippi, Montana, Oregon, and Wisconsin.¹⁷⁹ The Indiana Act embraces every type of conduct¹⁸⁰ except intentional conduct. Presumably most types of contributory fault will not be a defense to intentional conduct.¹⁸¹ In the context of product liability, all the theories of liability are embraced with the exception of fraud and deceit, a theory which is rarely employed. All the usual defenses are covered except product misuse. Strict liability cases will be governed by the Product Liability Act of 1978 as amended in 1983.¹⁸²

B. Comparative Fault Systems

In product cases accruing in Indiana after January 1, 1985, the New Hampshire rule of comparative fault will be applied both to the theories of liability and to the defenses. The New Hampshire system of comparative fault has become the most popular choice with state legislatures. It permits a plaintiff to recover if his fault equals that of defendant. He is

¹⁷²*Compare* Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 2, 1983 Ind. Acts 1930, 1930 (codified at IND. CODE §§ 34-4-33-2 (Supp. 1984)) with UNIF. COMP. FAULT ACT § 1(b), 12 U.L.A. 35 (Supp. 1984).

¹⁷³See MINN. STAT. ANN. § 604.01 (West Supp. 1984).

¹⁷⁴See WASH. REV. CODE ANN. § 4.22.005 (Supp. 1984).

¹⁷⁵See ARK. STAT. ANN. § 27-1763 (1979).

¹⁷⁶See Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2, 1984 Ind. Acts 1468, 1468.

¹⁷⁷See ME. REV. STAT. ANN. tit. 14, § 156 (1979).

¹⁷⁸See N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976).

¹⁷⁹See H. WOODS, COMPARATIVE FAULT §§ 6:3-6:10 (1978 & Supp. 1983).

¹⁸⁰Indeed, Indiana even includes "unreasonable failure to avoid an injury or to mitigate damages." IND. CODE § 34-4-33-2(a) (Supp. 1984). Hopefully these provisions will be read together and applied to seat belt cases, the failure of a motorcyclist to wear a crash helmet and similar cases. Certainly, the plaintiff's failure to mitigate damages *after* his damages have occurred should play no part in moving his percentage of fault over 50% and thus depriving him of any recovery at all.

¹⁸¹This is the general rule. H. WOODS, COMPARATIVE FAULT § 7:1 (1978).

¹⁸²See IND. CODE § 33-1-1.5-1 to -5 (Supp. 1984); *id.* § 33-1-1.5-6 to -8 (1982).

only barred if his fault "is greater than the fault of all persons whose fault proximately contributed to the claimant's damages."¹⁸³

Mississippi, the first state to adopt comparative negligence, opted for the pure form under which a plaintiff can recover from a negligent defendant, regardless of the extent of plaintiff's own negligence.¹⁸⁴ The Mississippi statute was copied from the Federal Employers Liability Act,¹⁸⁵ which is incorporated by reference into the Jones Act.¹⁸⁶ There has been much litigation under these statutes in Indiana, so there is some familiarity with a comparative fault system. Florida, California, Alaska, Michigan, New Mexico, Illinois, Iowa, and West Virginia have adopted comparative fault judicially without awaiting legislative enactment.¹⁸⁷ All except West Virginia have chosen the "pure" form.

In addition to the seven states mentioned above, New York, Rhode Island, Louisiana, Washington, and Mississippi have "pure" comparative statutes, making a total of twelve such jurisdictions. No jurisdiction has adopted the New Hampshire plan judicially, but fifteen states including Indiana have adopted it legislatively.¹⁸⁸ Eleven states have adopted the Georgia-Arkansas plan, which requires a plaintiff to be less negligent than the defendant in order to recover.¹⁸⁹ Nebraska permits comparison if the defendant's negligence is gross and the plaintiff's negligence is slight.¹⁹⁰ South Dakota originally adopted the Nebraska plan, but later removed the requirement of gross negligence on the defendant's part.¹⁹¹

C. Multiple Parties

Is the comparison of the plaintiff's fault to be made with the fault of each defendant individually or with the fault of all defendants in the aggregate? Resolution of this question has caused great difficulty and a split among the authorities. Statutory language has solved the problem in some states and the language in section 4 of the Indiana Act would seem to militate toward a comparison with the defendants' fault in the aggregate since the fault comparison is made with "all persons whose fault proximately contributed to the claimant's damages."¹⁹² This language seems

¹⁸³IND. CODE § 34-4-33-4(a) (Supp. 1984). Otherwise, his fault only diminishes his recovery under *id.* §-3.

¹⁸⁴MISS. CODE ANN. § 11-7-15 (1972). This system is best illustrated by a recent Washington case in which the jury found the plaintiff 99% negligent, the defendant 1% negligent, and damages of \$350,000. Judgment was correctly entered for \$3,500. *Lamborn v. Phillips Pac. Chem. Co.*, 89 Wash. 2d 701, 575 P.2d 215 (1978).

¹⁸⁵See H. WOODS, *COMPARATIVE FAULT*, § 1:11 (1978).

¹⁸⁶*Id.* § 3:5.

¹⁸⁷*Id.* § 4:2 (1978 & Supp. 1983).

¹⁸⁸*Id.* § 4:4 (1978 & Supp. 1983).

¹⁸⁹*Id.* §§ 4:2, 4:3 (1978 & Supp. 1983).

¹⁹⁰*Id.* § 4:5

¹⁹¹*Id.*

¹⁹²IND. CODE § 34-4-33-4(a), (b) (Supp. 1984).

to closely approximate the statutes of Texas¹⁹³ and Kansas,¹⁹⁴ both of which hold that the comparison should be made with the combined negligence of the defendants. When the statutory language is not clear, there is a split among the authorities.¹⁹⁵ The importance of this issue is shown by the following fact situation, which is not unusual. Assume plaintiff is found 40% at fault and each of two defendants 30% at fault. Is plaintiff barred or is there a recovery of 60% of the damages? The language of the Indiana statute dictates recovery based on these percentages.

The Indiana statute also requires the fact-finder to consider the fault of unsued third parties in determining the total percentage of fault.¹⁹⁶ Assume in a product liability case that some of the fault is attributed by the jury to the product designer over whom jurisdiction cannot be obtained. Suit is maintained against the manufacturer who was also at fault for a defect in the manufacture. The jury finds that the plaintiff is 50% at fault, the manufacturer 25% at fault, and the designer 25%. Clearly the plaintiff can recover because his fault is not greater than 50% of the total fault involved in the incident and the action is against one defendant.¹⁹⁷ Assume that damages are \$100,000. Plaintiff would multiply \$100,000 by 25% (amount of fault of only sued defendant), and his recovery would be \$25,000. In this situation if plaintiff was 60% at fault and the sued manufacturer and the unsued designer were each 20% at fault, plaintiff could not recover.

Let us carry the example one step further. Assume that plaintiff sues D^1 , a product manufacturer, D^2 , designer of the product, and D^3 , a component part manufacturer, alleging independent acts of fault on the part of each. Assume that the jury finds plaintiff 30% negligent, D^1 20%, D^2 25%, and D^3 25% negligent, and sets the damages at \$100,000. The jury would multiply \$100,000 by the percentage of fault of each defendant and enter a verdict against each defendant in the amount of the product.¹⁹⁸ The verdict against D^1 would be \$20,000; against D^2 , \$25,000, and against D^3 , \$25,000. The verdicts would total \$70,000 (\$100,000 less the 30% representing plaintiff's negligence).

Again, assume the above illustration, but that D^4 is an additional defendant as a principal of the agent D^3 . Then there would be a joint and several judgment in the amount of \$25,000 against D^3 and D^4 .¹⁹⁹ However, the other judgments would be several only, as indicated by the Indiana Act. If D^1 and D^2 have become bankrupt, plaintiff is out of luck

¹⁹³See TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1984).

¹⁹⁴See KAN. STAT. ANN. § 60-258a (1976).

¹⁹⁵The cases are collected in H. WOODS, COMPARATIVE FAULT §13:1 (1978).

¹⁹⁶IND. CODE § 34-4-33-5(a)(1), (b)(1) (Supp. 1984).

¹⁹⁷See *id.* § 34-4-33-5(a)(2), (3).

¹⁹⁸See *id.* § 34-4-33-5(b)(4).

¹⁹⁹The joint and several liability of D^3 and D^4 arises from their treatment as a single party under *id.* § 34-4-33-2(b).

because there is no joint and several judgment against D^1 , D^2 , and D^3 .²⁰⁰ Verdicts are entered individually against each of them. The same is true whenever an unsued person whose fault contributed to the incident is involved. Assume again in the last illustration that jurisdiction was not obtained over D^2 , the designer, who nevertheless was assessed 25% of the fault. Assume further that D^3 went bankrupt. Plaintiff could then recover only the \$20,000 assessed against D^1 even though his net damage was \$70,000.

The Indiana statute most nearly resembles that of Kansas in providing only several liability between defendants²⁰¹ and in permitting the assessment of fault against unsued parties.²⁰² Whatever percentage is assessed against these unsued or unsuable entities reduces the amount of plaintiff's recovery. This aspect of the Indiana Act, reflected by the Kansas experience, is very unfavorable to the plaintiff. For instance, in Kansas the fact finder must assess the fault of an immune spouse;²⁰³ an employer with workers' compensation immunity;²⁰⁴ a released party;²⁰⁵ and a supervisory parent in an injured minors claim.²⁰⁶ Under the Indiana Comparative Fault Act, the claimant's employer may not be considered a nonparty,²⁰⁷ and therefore the employer's fault cannot be considered, which may generate confusion in cases where the immune employer is clearly at fault in the accident out of which the claim arose.

Where a retailer sells a defectively manufactured product, should the manufacturer and retailer be considered a single party?²⁰⁸ This is a most important question. If they are to be considered a single party, the liability would in all probability be joint and several. A recent unreported maritime case illustrates the problems that can be involved.²⁰⁹ Plaintiffs' decedent was asphyxiated while asleep on a yacht manufactured by defendant Boatel

²⁰⁰See *id.* § 34-4-33-5(b)(4).

²⁰¹See *Coca-Cola Bottling Co. v. Vendo Co.*, 455 N.E.2d 370, 372 (Ind. Ct. App. 1983) ("We are also aware that Indiana's prospective comparative negligence statute . . . does not provide for contribution among joint tortfeasors, but instead limits recovery against each primary tortfeasor to a percentage of the damages corresponding to that defendant's degree of fault." (footnote omitted)).

²⁰²Kan. Stat. Ann. § 60-258a(d) (1976). See Kansas cases collected in H. WOODS COMPARATIVE FAULT, (1978 & Supp. 1983); see generally *id.* § 13:4.

²⁰³*Miles v. West*, 224 Kan. 284, 580 P.2d 876 (1978).

²⁰⁴*Scales v. St. Louis - S.F. Ry.*, 2 Kan. App. 2d 491, 582 P.2d 300 (1978); *McLesky v. Noble Corp.*, 2 Kan. App. 2d 240, 577 P.2d 830 (1978). The 1984 amendment to the Indiana Comparative Fault Act provides: "A nonparty shall not include the employer of the claimant." IND. CODE § 34-4-33-2(a) (Supp. 1984). This means that in Indiana, contrary to Kansas, the fault of the employer cannot be used to reduce plaintiff-employee's recovery.

²⁰⁵*McCart v. Muir*, 230 Kan. 618, 641 P.2d 384 (1982).

²⁰⁶*Lester v. Magic Chef*, 230 Kan. 643, 641 P.2d 353 (1982).

²⁰⁷See IND. CODE § 34-4-33-2(a) (Supp. 1984).

²⁰⁸See IND. CODE § 34-4-33-2(b) (Supp. 1984).

²⁰⁹This case is unreported but is discussed at some length in H. WOODS, COMPARATIVE FAULT § 13:12 at 243-44 (1978).

and sold by defendant Medlin Marine. The yacht's air conditioning components were sold to Boatel by defendant Marine Development Corporation, and one was installed in the bilge of the yacht. Boatel drilled drain holes over the air conditioning generator exhaust. Carbon monoxide was introduced through these holes and distributed throughout the yacht by the air conditioning unit. The case was tried in admiralty against the three above-mentioned defendants. The manufacturer, Boatel, was insolvent and defaulted. United States District Judge Eisele held that both Boatel (the manufacturer) and Marine Development (the air conditioning manufacturer) were negligent, the latter for failure to warn with regard to the placement of its unit in the yacht. Responsibility was divided between these two defendants, 80% on Boatel and 20% on Marine. Medlin, who sold the yacht and admittedly was nothing more than a conduit, was found responsible on the theory of implied warranty and strict liability in tort. As between Marine Development (the air conditioning manufacturer) and Medlin (the retail seller), responsibility was divided 50-50. Although Medlin was granted indemnity against the insolvent manufacturer, it was relegated to 50-50 contribution as a joint tort-feasor with respect to Marine. The United States Court of Appeals for the Eighth Circuit affirmed by an equally divided court. Even though admiralty law applied in the above case, Indiana courts will soon be faced with similar situations and could confront identical issues. In such a situation, would they consider Medlin (the retailer), Boatel (the manufacturer) and Marine (the component manufacturer) as single parties so that joint and several liability would apply, thus allowing the plaintiff to recover his entire judgment against any one party? Although Marine had no relationship to Medlin, it was a component supplier to Boatel. Would Boatel and Marine be single parties? These questions will have to be answered by the Indiana courts.

D. Settlements

Where a settlement is made with one of several tort-feasors, do the remainder get credit for the dollar amount paid or the percentage of fault assessed against the settling tort-feasors? California follows what is known as the *River Garden* rule.²¹⁰ According to that rule, a tort-feasor may settle and be dismissed from the case as long as the settlement is made in good faith. The remaining tort-feasors receive credit only for the dollar amount of the settlement. Other jurisdictions such as New Jersey give credit to the remaining tort-feasors only to the extent of any percentage of fault allocated by the jury.²¹¹ Pennsylvania gives credit for either the

²¹⁰See *River Garden Farms v. Superior Court*, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

²¹¹Under the New Jersey Comparative Negligence Law "only the percentage amount equal to the percentage of negligence attributable to the settling defendant is deducted, no matter what the size of the settlement." *Kotzian v. Barr*, 81 N.J. 360, 368 n.2, 408 A.2d

dollar amount on the percentage of fault allocated, whichever is greater.²¹²

These states permit contribution among joint tort-feasors as do most jurisdictions.²¹³ The Indiana Comparative Fault Act retains the common law rule which does not permit contribution among joint tort-feasors.²¹⁴ The effect of the Comparative Fault Act is to reduce the liability of the remaining tort-feasors by the percentage of fault allocated to the settling party. The amount paid by the settling party has no effect on the amount owed by the remaining tort-feasors whose liability is fixed entirely by the percentage of fault assessed severally against them by the fact finder.

VIII. MULTIPLE THEORIES

It is very common for the plaintiff in a product liability case to include separate counts in the complaint for negligence and strict liability. The interaction of the Comparative Fault Act with the Product Liability Act could cause great confusion for the litigators, the court, and the jury in such a case.

Assume that *P* is injured while working on a machine at his place of employment. He sues *D*¹, the manufacturer of the machine, and *D*², the seller, on theories of negligence and strict liability. *P*'s employer, *E*, is immune under the Workmens' Compensation Act,²¹⁵ and cannot be a nonparty under the Comparative Fault Act.²¹⁶ Through the process of discovery, *D*¹ and *D*² reach the conclusion that *P*'s injury was caused at least in part by the misuse of the machine by *E*. The defendants also find evidence that *P*'s negligence contributed to his own injury and that *P* incurred the risk involved in the use of the machine.

*D*¹ and *D*² first must be careful to keep straight their defenses to the separate counts of the complaint. If *E*'s misuse of the machine is alleged to be the sole cause of *P*'s injury, then *P*'s recovery from *D*¹ and *D*² would be barred under the strict liability count; however, if *E*'s misuse combined with a defect in the product to cause *P*'s injury, then *P*'s strict liability recovery would not be barred (although *E*'s rights as a worker's compensation lienholder would be barred).²¹⁷ *E*'s misuse of the product is no defense to the negligence claim.²¹⁸ In addition, although

131, 133, n.2 (1979) (quoting *Rogers v. Spady*, 147 N.J. Super. 274, 278, 371 A.2d 285, 288 (App. Div. 1977)).

²¹²*Daugherty v. Hershberger*, 386 Pa. 367, 126 A.2d 730 (1956). See a discussion of *Daugherty* in H. WOODS, *COMPARATIVE FAULT* § 13:7 (1978).

²¹³Twenty states have now adopted some version of the Uniform Contribution Among Tortfeasors Act. H. WOODS, *COMPARATIVE FAULT* § 13:7 (1978 & Supp. 1983).

²¹⁴*Coca-Cola Bottling Co., v. Vendo Co.*, 455 N.E.2d 370, 372 (Ind. Ct. App. 1983) (dicta).

²¹⁵See IND. CODE § 22-3-2-6 (1982).

²¹⁶*Id.* § 34-4-33-2(a) (Supp. 1984).

²¹⁷*Id.* § 33-2-1.5-4(b)(2) (Supp. 1984).

²¹⁸Originally, Indiana included product misuse as an element of fault, but the 1984

P's contributory negligence would be a percentage fault factor on the negligence count,²¹⁹ it would be no defense to the strict liability claim.²²⁰ Finally, "unreasonable" assumption of risk would be a complete defense to *P*'s strict liability claim,²²¹ but only a percentage fault factor in the negligence count.²²²

At trial, *P* puts on his evidence of the liability of *D*¹ and *D*². The defendants then present the jury with their evidence of *E*'s misuse of the product, and of *P*'s contributory negligence and incurrence of the risk by using the machine. *P* presents any rebuttal evidence and both sides make their final arguments.

The court must then instruct the jury regarding the different applications of the misuse, contributory negligence, and incurred risk defenses to the negligence and strict liability theories. In addition, the court must distinguish for the jury the contributory negligence defense from incurred risk, which is sometimes a difficult task.²²³ Finally, unless the parties agree otherwise, the court must instruct the jury in accordance with the Comparative Fault Act regarding how the jury should determine its verdict.²²⁴

A number of results are possible that would raise questions about the appropriateness of and consistency between the jury's verdicts on the negligence and strict liability claims. The simplest result would be a verdict for *D*¹ and *D*² on the strict liability count, and a finding that *P* was 70% at fault, *D*¹ was 15% at fault, and *D*² was 15% at fault on the negligence count. These verdicts would be consistent under the theory that *P* incurred the risk and that this accounted for 70% of the total fault involved in the accident.²²⁵ Thus, *P* would be barred from recovery.

However, suppose the jury found the same percentages of fault on the negligence count, but returned a verdict for *P* on the strict liability claim. Did the jury commit error, or are these results reconcilable by attributing *P*'s 70% fault to contributory negligence, which, unlike incurred risk, is not a defense to a strict liability claim? Will the court attempt

amendment removed it. See Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2, 1984 Ind. Acts 1468, 1468 (codified at IND. CODE § 34-4-33-2(a) (Supp. 1984)).

²¹⁹IND. CODE § 34-4-33-2(a) (Supp. 1984).

²²⁰See IND. CODE § 33-1-1.5-4(b) (Supp. 1984); *Perfection Paint & Color Co. v. Konduris*, 147 Ind. App. 106, 118-19, 258 N.E.2d 681, 689 (1970).

²²¹IND. CODE § 33-1-1.5-4(b)(1) (Supp. 1984).

²²²*Id.* § 34-4-33-2(a).

²²³See *supra* notes 58-63 and accompanying text.

²²⁴IND. CODE § 34-4-33-5 (Supp. 1984).

²²⁵Theoretically, incurred risk is nothing more than consent, and operates to negate the duty element of a negligence case. Thus it should constitute a complete defense, since one either consents to a risk or does not; however, by including incurred risk within its definition of fault, the legislature must not have intended that incurred risk be a complete defense in a negligence action under the Comparative Fault Act. Thus, a jury verdict assigning less than 100% of the fault to a plaintiff where the defense is incurred or assumed risk would be consistent with the Act.

to construe the verdicts as being consistent, or will it require that it affirmatively appear that the verdicts are consistent before allowing them to stand?

Similar questions would arise if the jury returned a verdict for *P* on the strict liability claim, and found *P* 10% at fault and *D*¹ and *D*² each 45% at fault on the negligence claim. Would the court allow the strict liability verdict to stand or would it reverse on the possibility that the jury assigned *P* 10% of the fault based on evidence that he incurred the risk, a defense to strict liability?

Suppose that these facts are altered just slightly so that the jury returns a verdict for *P* on the strict liability count and finds each of the defendants 50% at fault. Will *P* be allowed to choose his verdict? If so, he will almost certainly choose the strict liability verdict which, unlike the negligence finding, gives rise to joint and several liability between *D*¹ and *D*², protecting *P* against the insolvency of either.

The presence of the defense of misuse by *E* will also present special problems in a product case based both on negligence and strict liability. For example, has the jury committed error if it returns a negligence verdict of *D*¹, 30% at fault, *D*², 30% at fault, and *P*, 0% at fault? One could assume from such a verdict that the jury found *E*'s misuse of the injury-causing machine to be responsible for the remaining 40% of the fault, but does the Comparative Fault Act permit this result? The Act states: "The percentage of fault figures of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties."²²⁶ Clearly, by statute, *E* may not be made a nonparty²²⁷ and thus could not have a percentage of fault assigned directly to him. Does the language quoted above permit the indirect assignment of a percentage of fault that would be assigned to *E* if he were a nonparty to be allocated to the parties to the action? If the above-quoted language does permit an implicit assignment of a fault percentage to *E*, the result will be that *P* bears the loss for that percentage, because *E* will have workers' compensation immunity against *P*.²²⁸

This raises the problem of workers' compensation liens. The Comparative Fault Act excepts such liens from the general rule that when a claimant's recovery is diminished by his comparative fault or by the uncollectability of the full value of his claim, then any subrogation claim or other lien (except a workers' compensation or occupational disease lien) that arose out of the payment of medical or other benefits is diminished in the same proportion as the claimant's recovery.²²⁹ A worker's compen-

²²⁶IND. CODE § 34-4-33-5(a)(1) (Supp. 1984).

²²⁷*Id.* § 34-4-33-2(a).

²²⁸*See* IND. CODE § 22-3-2-6 (1982).

²²⁹*Id.* § 34-4-33-12 (Supp. 1984).

sation or occupational disease lienholder would recover the full amount of his lien regardless of the diminution of the plaintiff's recovery. The Product Liability Act states:

Where the physical harm to the claimant is caused jointly by a defect in the product which made it unreasonably dangerous when it left the seller's hands and by the misuse of the product by a person other than the claimant, then the conduct of that other person does not bar recovery by the claimant for the physical harm, but shall bar any right of that other person, either as a claimant or as a lienholder, to recover from the seller on a theory of strict liability.²³⁰

Assuming that it is permissible for the jury to assign indirectly a percentage of fault to a ghost nonparty such as *E* on the negligence claim, suppose the jury returns a verdict for *P* on the strict liability claim and a finding on the negligence claim that *P* was not at fault in any percentage, *D*¹ was 20% at fault and *D*² 30% at fault. The implication of such a verdict is that the jury found *E*'s misuse of the machine to contribute 50% of the total fault in the accident. That 50% would be uncollectable to *P* because of *E*'s workers' compensation immunity. Would *E* still be entitled to his undiminished lien under the Comparative Fault Act,²³¹ or would *E* be barred from recovering his lien under the Product Liability Act?²³² If *P* had any choice in the matter, he would surely choose his strict liability remedy, not only to avoid paying *E*'s lien, but also to obtain joint and several liability from *D*¹ and *D*².

The hypothetical fact situation set forth above is neither unusual nor particularly complex; the results, however, could be both. As parties and nonparties and other product liability theories are added, the potential problems grow exponentially. Obviously, the trial of a product liability case that involves Indiana's Comparative Fault Act and the Product Liability Act will be a challenge to bench, bar, and jury. Perhaps the solution lies in the judicious use of interrogatories and special verdicts. However, the Act is quite specific on how the case is submitted to the jury. Presumably, the Section being procedural, it would not be binding on the federal courts.

IX. CONCLUSION

Although on the whole the Indiana Comparative Fault Act represents a stride forward, some of its aspects deserve criticism. The abandonment of joint and several liability has not worked well in Kansas and is a step backward in the view of most commentators and most courts who have

²³⁰*Id.* § 33-1-1.5-4(b)(2) (Supp. 1984).

²³¹See *supra* text accompanying note 229.

²³²See *supra* text accompanying note 232.

considered this question.²³³ In addition, asking the fact finder to assess fault of a nonparty would seem to be fraught with a danger of unfairness and even fraud. It is easy for one or more of the actual parties to manipulate the role of a nonparty.²³⁴ Third party practice permitted in most jurisdictions will ensnare virtually all who have a real stake in the litigation. Trying parties in absentia is never satisfactory, especially when the result has a profound effect on those who are present and participating.²³⁵ On the other hand, the Indiana Act attempts a comparison of the plaintiff's fault with the fault of all others whose fault contributed to the incident, even where those others may not be made parties to the lawsuit. In theory this should yield a more accurate determination of percentages of fault than is possible where the fault of such unsuable parties is not considered at all.

Indiana is in step with the trend of the times in opting for comparative fault, and is to be commended for rejecting "blindfolding," under which the jury may not be told of the ultimate effect of its answers to the interrogatories.²³⁶ The adoption of comparative fault between plaintiff and defendant should lead to the opportunity for comparative fault to be applied among multiple defendants. Some jurisdictions have incorporated a system of proportionate assessment of fault between defendants as a feature of their comparative fault acts.²³⁷ This commendable step could easily be incorporated into the Indiana Act. The litigation which will unfold in the near future over the Act will be the best indicator of its workability, and of the changes that can be made to improve the Act.

²³³Oakley v. United States, 622 F.2d 447, 449 (9th Cir. 1980); Department of Transp. v. Webb, 409 So. 2d 1061, 1063 (Fla. Dist. Ct. App. 1981); Cornell v. Langland, 109 Ill. App. 3d 472, 477, 440 N.E.2d 985, 988 (1982); MacLachlan v. Brotherhood Oil Corp., 404 N.E.2d 1272, 1273 (Mass. App. Ct. 1980); Anderson v. Harry's Army Surplus, 117 Mich. App. 601, 610, 324 N.W.2d 96, 100 (1982).

²³⁴The same dangers seem to be inherent here as in the use of Mary Carter agreements. See Note, *Mary Carter in Arkansas: Settlements, Secret Agreements and Some Serious Problems*, 36 ARK. L. REV. 576 (1983).

²³⁵See H. WOODS, COMPARATIVE FAULT §§ 13:2, 13:3 (1978).

²³⁶See H. WOODS, COMPARATIVE FAULT § 18:2 (1978), where cases and statutes are collected showing that "blindfolding" is being rejected in a majority of states.

²³⁷See *id.* § 13:6.

Appendix

Chapter 33. Comparative Fault

Effective January 1, 1985

- 34-4-33-1 Application of chapter; causation
- 34-4-33-2 Definitions; defendant as single party
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34-4-33-1 Application of chapter; causation

Sec. 1. (a) This chapter governs any action based on fault that is brought to recover damages for injury or death to person or harm to property.

(b) In an action brought under this chapter, legal requirements of causal relation apply to:

- (1) fault as the basis for liability; and
- (2) contributory fault.

As added by P.L.317-1983, SEC.1.

34-4-33-2 Definitions; defendant as single party

Sec. 2. (a) As used in this chapter:

“Fault” includes any act or omission that is negligent, willful, wanton, or reckless toward the person or property of the actor or others, but does not include an intentional act. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.

“Nonparty” means a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant. A nonparty shall not include the employer of the claimant.

(b) For purposes of sections 4 and 5 of this chapter, a defendant may be treated along with another defendant as a single party where recovery is sought against that defendant not based upon his own alleged act or omission but upon his relationship to the other defendant. *As added by P.L.317-1983, SEC.1. Amended by P.L.174-1984, SEC.1.*

34-4-33-3 Effect of contributory fault

Sec. 3. In an action based on fault, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery except as provided in section 4 of this chapter. *As added by P.L.317-1983, SEC.1.*

34-4-33-4 Barring of recovery; degree of contributory fault

Sec. 4. (a) In an action based on fault that is brought against:

(1) one (1) defendant; or

(2) two (2) or more defendants who may be treated as a single party; the claimant is barred from recovery if his contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages.

(b) In an action based on fault that is brought against two (2) or more defendants, the claimant is barred from recovery if his contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages. *As added by P.L.317-1983, SEC.1. Amended by P.L.174-1984, SEC.2.*

34-4-33-5 Instructions to jury; award of damages

Sec. 5. (a) In an action based on fault that is brought against one (1) defendant or two (2) or more defendants who may be treated as a single party, and that is tried to a jury, the court, unless all the parties agree otherwise, shall instruct the jury to determine its verdict in the following manner:

(1) The jury shall determine the percentage of fault of the claimant, of the defendant, and of any person who is a nonparty. The percentage of fault figures of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties.

(2) If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant's death, injury, or property damage, the jury shall return a verdict for the defendant and no further deliberation of the jury is required.

(3) If the percentage of fault of the claimant is not greater than fifty percent (50%) of the total fault, the jury then shall determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.

(4) The jury next shall multiply the percentage of fault of the defendant by the amount of damages determined under subdivision (3) and shall then enter a verdict for the claimant in the amount of the product of that multiplication.

(b) In an action based on fault that is brought against two (2) or more defendants, and that is tried to a jury, the court, unless all the parties agree otherwise, shall instruct the jury to determine its verdict in the following manner:

(1) The jury shall determine the percentage of fault of the claimant, of the defendants, and of any person who is a nonparty. The percentage of fault figures of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties.

(2) If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant's death, injury, or property damage, the jury shall return a verdict for the defendants and no further deliberation of the jury is required.

(3) If the percentage of fault of the claimant is not greater than fifty percent (50%) of the total fault, the jury shall then determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.

(4) The jury next shall multiply the percentage of fault of each defendant by the amount of damages determined under subdivision (3) and shall enter a verdict against each such defendant (and such other defendants as are liable with the defendant by reason of their relationship to such defendant) in the amount of the product of the multiplication of each defendant's percentage of fault times the amount of damages as determined under subdivision (3).

(c) In an action based on fault that is tried by the court without a jury, the court shall make its award of damages according to the principles specified in subsections (a) and (b) for juries. *As added by P.L.317-1983, SEC.1. Amended by P.L.174-1984, SEC.3.*

34-4-33-6 Forms of verdicts; disclosure requirements

Sec. 6. The court shall furnish to the jury forms of verdicts that require the disclosure of:

- (1) the percentage of fault charged against each party;
- (2) the calculations made by the jury to arrive at their final verdict.

If the evidence in the action is sufficient to support the charging of fault to a nonparty, the form of verdict also shall require a disclosure of the name of the nonparty and the percentage of fault charged to the nonparty. *As added by P.L.317-1983, SEC.1.*

34-4-33-7 Contribution; indemnity

Sec. 7. In an action under this chapter, there is no right of contribution among tortfeasors. However, this section does not affect any rights of indemnity. *As added by P.L.317-1983, SEC.1.*

34-4-33-8 Government entities or public employees excepted

Sec. 8. This chapter does not apply in any manner to tort claims against governmental entities or public employees under IC 34-4-16.5. *As added by P.L.317-1983, SEC.1.*

34-4-33-9 Verdict; inconsistent award with determinations of total damages and percentages of fault

Sec. 9. In actions brought under this chapter, whenever a jury returns verdicts in which the ultimate amounts awarded are inconsistent with its determinations of total damages and percentages of fault, the trial court shall:

- (1) inform the jury of such inconsistencies;
- (2) order them to resume deliberations to correct the inconsistencies; and
- (3) instruct them that they are at liberty to change any portion or portions of the verdicts to correct the inconsistencies.

As added by P.L.174-1984, SEC.4.

34-4-33-10 Nonparty defense; assertion; burden of proof; pleadings; application

Sec. 10. (a) In an action based on fault, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty. Such a defense is referred to in this section as a nonparty defense.

(b) The burden of proof of a nonparty defense is upon the defendant, who must affirmatively plead the defense. However, nothing in this chapter relieves the claimant of the burden of proving that fault on the part of the defendant or defendants caused, in whole or in part, the damages of the claimant.

(c) A nonparty defense that is known by the defendant when he files his first answer shall be pleaded as a part of the first answer. A defendant who gains actual knowledge of a nonparty defense after the filing of an answer may plead the defense with reasonable promptness. However, if the defendant was served with a complaint and summons more than one hundred fifty (150) days before the expiration of the limitation of action applicable to the claimant's claim against the nonparty, the defendant shall plead any nonparty defense not later than forty-five (45) days before the expiration of that limitation of action. The trial court may alter these time limitations or make other suitable time limitations in any manner that is consistent with:

- (1) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense; and
- (2) giving the claimant a reasonable opportunity to add the nonparty as an additional defendant to the action before the expiration of the period of limitation applicable to the claim.

(d) This section applies to a claim filed with the insurance commissioner under IC 16-9.5 against a qualified health care provider, with the exception that the pleading of a nonparty defense, as required by subsections (b) and (c), must occur not later than ninety (90) days after the filing of the claim with the insurance commissioner. However, this time limitation may be enlarged or shortened by a court having jurisdiction over the claim in such matter as will give:

- (1) the qualified health care provider reasonable opportunity to discovery [sic] the existence of a nonparty defense; and
- (2) the claimant reasonable opportunity to assert a claim against the nonparty before the expiration of the period of limitation application to the claim.

As added by P.L.174-1984, SEC.5.

34-4-33-11 Actions against defendants who are qualified health care providers and who are not qualified health care providers; delay; joinder

Sec. 11. When an action based on fault is brought by the claimant against one (1) or more defendants who are qualified health care providers under IC 16-9.5, and, also is brought by suit against one (1) or more defendants who are not qualified health care providers, upon application of the claimant, the trial court shall grant reasonable delays in the action brought against those defendants who are not qualified health care providers until the medical review panel procedure can be completed as to the qualified health care providers. When an action is permitted to be filed against the qualified health care providers, the trial court shall permit a joinder of the qualified health care providers as additional defendants in the action on file against the nonhealth care providers. *As added by P.L.174-1984, SEC.6.*

34-4-33-12 Liens or claims to diminish in same proportion as claimant's recovery is diminished

Sec. 12. If a subrogation claim or other lien or claim, other than a lien under IC 22-3-2-13 or IC 22-3-7-36, that arose out of the payment of medical expenses or other benefits exists in respect to a claim for personal injuries or death and the claimant's recovery is diminished:

- (1) by comparative fault; or
- (2) by reason of the uncollectibility of the full value of the claim for personal injuries or death resulting from limited liability insurance or from any other cause;

the lien or claim shall be diminished in the same proportion as the claimant's recovery is diminished. *As added by P.L.174-1984, SEC.7.*

34-4-33-13 Application

Sec. 13. This chapter does not apply in any manner to strict liability actions under IC 33-1-1.5 or to breach of warranty actions. *As added by P.L.174-1984, SEC.8.*



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